CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

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Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 **JUNE 14, 1995** **NO. 24**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, May 31, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

MODIFICATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF UNFINISHED RAILCARS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying one ruling and revoking two others ruling relating to the tariff classification of incomplete or unfinished railway or tramway passenger coaches, both self-propelled and not self-propelled. Notice of the proposed modification and revocations was published on April 26, 1995, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after August 14, 1995.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Metals and Machinery Classification Branch (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On April 26, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 17, proposing to modify *HQ* ruling 950118,

dated December 10, 1991, and to revoke *HQ* 089208 and *HQ* 952234, dated, respectively, December 26, 1991, and July 23, 1992. These decisions classified certain incomplete or unfinished railway or tramway passenger coaches as complete or finished articles, in subheading 8603.10.00, and in heading 8605.00.00, Harmonized Tariff Schedule of the United States (HTSUS), as appropriate.

One comment was received in response to the notice. The commenter notes that the proposed modification and revocations give proper recognition to the Harmonized Commodity Description and Coding System Explanatory Notes to Chapter 86 and represent the correct application of General Rule of Interpretation 2(a), HTSUS.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying *HQ* 950118 in part to reflect the proper classification of incomplete A and B carbodies, imported unassembled on the same vessel, in subheading 8607.99.50, HTSUS, a provision for other parts of railway or tramway locomotives or rolling stock. The rate of duty is 3.7 percent *ad valorem*. Customs is also revoking *HQ* 089208 and *HQ* 952234 to reflect the proper classification of partially outfitted carbodies for railway or tramway passenger coaches, not self-propelled, in subheading 8607.99.10 HTSUS, a provision for other parts of railway or tramway locomotives or rolling stock of heading 8605 or 8606, except brake regulators. The rate of duty is 5 percent *ad valorem*.

HQ 957790 modifying *HQ* 950118 is set forth as Attachment "A" to this document. *HQ* 957777 revoking *HQ* 089206 and *HQ* 952234 is set forth as Attachment "B" to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: May 30, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 30, 1995.

CLA–2 R:C:M 957790 JAS
Category: Classification
Tariff No. 8603.10.00 and 8607.99.50

MR. NED B. MARSHAK, ESQ.
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
67 Broad Street
New York, NY 10004

Re: Unassembled railway cars; railway cars, incomplete, unfinished self-propelled railway or tramway coaches powered from an external source of electricity, subheading 8603.10.00; essential character, GRI 2(a); *HQ* 950118 modified.

DEAR MR. MARSHAK:

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of *HQ* 950118 was published in the CUSTOMS BULLETIN, Volume 29, Number 17.

In *HQ* 950118, dated December 10, 1991, we replied to a ruling request of August 9, 1991, on behalf of **Breda Costruzioni Ferroviarie,** on the classification of certain rapid transit subway railcars from Italy.

The ruling held that the railcars were classifiable in subheading 8603.10.00, Harmonized Tariff Schedule of the United States (HTSUS), as self-propelled railway or tramway coaches, vans and trucks, other than those of heading 8604, powered from an external source of electricity. We have reviewed the matter and are now of the opinion that the ruling is partially incorrect. Accordingly, it is modified by this ruling.

Facts:

The transit cars in this request are distinct carbodies consisting of A and B sections, which must be joined together as "married pairs" into an articulated self-propelled railway coach. The separate A and B carbodies cannot independently function as a self-propelled railcar. Each A and B carbody is essentially complete in and of itself, lacking only minor electrical and propulsion components supplied by the other car to be fully operational.

These cars were imported in three factual situations: two fully outfitted A carbodies and two fully outfitted B carbodies on the same vessel, requiring minor assembly operations for completion into a functioning unit; A carbodies on one vessel and B carbodies on another vessel; and incomplete A and incomplete B carbodies imported unassembled on the same vessel. In this last situation, each carbody consists of a structural shell, windows, doors, underframe, interior lighting and fixtures, air diffuser ducting, wiring and tubing for connection to the electrical and mechanical components. The imported components in the third situation constitute 49.7 percent of the cost or value of a complete self-propelled railcar. The remaining 50.3 percent of the cost or value of the completed car is represented by components to be added in the United States including the propulsion system, ATC equipment, brake equipment, couplers, air conditioning system, intercommunication radio system, wheel assembly, seats, bearings, and trucks.

The provisions under consideration are as follows:

8603	Self-propelled railway or tramway coaches, vans and trucks, other than those of heading 8604:
8603.10.00	Powered from an external source of electricity * * * 6 percent
*	* * * * * * *
8607	Parts of railway or tramway locomotives or rolling stock:
	Other:
8607.99	Other:
8607.99.50	Other * * * 3.7 percent

Issue:

Whether A and B carbodies imported in each of the three fact patterns, as described, are self-propelled railway or tramway coaches of heading 8603; if not, whether they are parts of heading 8607.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 2(a) states, in part, that incomplete or unfinished articles are to be classified in the same heading as the complete or finished article, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It also applies to complete or finished articles entered unassembled or disassembled.

The **Harmonized Commodity Description and Coding System Explanatory Notes (ENs)** constitute the Customs Cooperation Council's official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the notes should always be consulted. *See* T.D. 69–80, 54 Fed. Reg. 35127, 35218 (Aug. 23, 1989).

In the first factual situation, A and B carbodies imported on the same vessel are unassembled or disassembled articles under GRI 2(a). They will continue to be classifiable in subheading 8603.10.00, HTSUS, as self-propelled railway or tramway coaches powered from an external source of electricity.

In the second factual situation, each A and B carbody, though imported separately, is nevertheless recognizable as a complete railway coach consisting of a fully outfitted passenger compartment, underframe and truck. Each carbody lacks only minor electrical and propulsion components supplied by the other car to make the articulated car operational. We note that the **General Explanatory Notes (EN)** to Chapter 86, at p. 1414, list motorized railway or tramway coaches not fitted with a power unit as examples of incomplete or unfinished vehicles. For these reasons, we remain of the opinion that each A and B carbody has the essential character of a self-propelled railway coach because each car has the aggregate of distinctive component parts that establishes its identity as a railway coach.

In the third factual situation *HQ* 950118 concluded that the incomplete A and B carbodies, as described, imported unassembled on the same vessel, had the essential character of complete or finished railway coaches. We have reconsidered this position and are now of the opinion that undue reliance may have been placed on legal principles developed under the HTSUS predecessor tariff code, the Tariff Schedules of the United States. While we recognize that on a case-by-case basis administrative and judicial decisions under a prior nomenclature can be instructive in interpreting provisions of the HTSUS this is not the case here. We also believe that the characterization of a railway passenger coach first and foremost as a vehicle capable of a transport function must be more fully considered. In this latter regard, the previously cited **EN** to Chapter 86 states that incomplete or unfinished vehicles are classified with the corresponding complete or finished vehicles, provided they have the essential character thereof. The note then lists examples of vehicles that would be considered incomplete or unfinished for tariff purposes. However, the **EN** then continues by stating that bodies of motorized railway or tramway coaches, of vans, wagons or trucks, or of tenders, not mounted on underframes, are classified as parts of railway or tramway locomotives or rolling stock (heading 86.07). For these reasons, it is now our position that the incomplete or unfinished A and B carbodies, as described, do not have the essential character of complete or finished self-propelled railway passenger coaches.

Holding:

Under GRI 2(a), the A and B carbodies in the first factual situation are unassembled articles provided for in heading 8603. They are classifiable in subheading 8603.10.00, HTSUS. Under GRI 2(a), each A and B carbody in the second factual situation has the essential character of a railway or tramway coach of heading 8603. Each A and B carbody is classifiable in subheading 8603.10.00, HTSUS. The incomplete A and B carbodies in the third factual situation lack the essential character of a self-propelled railway coach of head-

ing 8603. Under GRI 1, they are provided for in heading 8607. These carbodies are classifiable in subheading 8607.99.50, HTSUS.

Effect on Other Rulings:

HQ 950118, dated December 10, 1991, is modified consistent with this decision. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 U.S.C. 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 30, 1995.

CLA–2 R:C:M 957777 JAS
Category: Classification
Tariff No. 8607.99.10

MR. JAMES S. O'KELLY, ESQ.
BANES, RICHARDSON & COLBURN
475 Park Avenue South
New York, NY 10016

Re: Incomplete, unfinished railway or tramway passenger coach, not self-propelled; partially outfitted railway carbody imported without underframe and truck or bogie; essential character, GRI 2(a); heading 8605.00.00; parts of railway or tramway rolling stock; *HQ* 089208 and *HQ* 952234 revoked.

DEAR MR. O'KELLY:

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *HQ* 089208 and *HQ* 952234 was published on April 26, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 17.

In *HQ* 089208, dated December 26, 1991 (I.A. 20/91) and *HQ* 952234, dated July 23, 1992 (I.A. 44/92), to the Area Director of Customs, New York Seaport, we responded to requests for internal advice you initiated as counsel for **Mitsui & Co. (U.S.A.) Inc.**

In these decisions we held that certain railway carbodies imported under contract with the Long Island Railroad were incomplete or unfinished railway or tramway passenger coaches not self-propelled, classifiable in heading 8605.00,00, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed the matter and are now of the opinion that these rulings are incorrect. Accordingly, they are revoked by this ruling,

Facts:

The importations consist of partially outfitted carbodies which, after importation, are combined with truck assemblies or bogies, coupling devices, and other separately imported components into complete railcars, not self-propelled. The components for coaches designated 1 and 2 each consist of two sides, two ends, and roof, of aluminum and/or steel construction. Also included are the windows and doors, toilets, wall cabinet, ceiling and flooring materials, radio with antenna and power supply unit, air conditioning unit with electrical supply, electric coupler with battery and cables, brake hoses and valves, passenger and saloon area luggage racks, exterior indicator light, plus one, two and three-passenger seat frames with cushions, door access panels, stairway and exterior handles. The carbody shells, outfitted with their components, as described, form more or less complete railway carbodies. You advised us that because of their unique design and construction

these cars do not require underframes. You state that the value of the imported components represents approximately 74 percent of the value of each completed passenger coach.

The components for coaches 3 through 10 each consist of two sides, two ends and a roof, of aluminum and/or steel construction, a low voltage power supply unit, air conditioning unit, passenger area luggage rack, frames for seats, coat hooks, windows, doors, toilets, wall cabinets, and ceiling and flooring materials. These components represent approximately 48.7 percent of the cost or value of a completed passenger coach.

After importation, the described components were assembled with trucks or bogies and coupling devices to form 10 complete railway or tramway passenger coaches, When completed, these cars are intended to be used as an A and B "married" pair; however, each car will be complete and capable of independent use as a railway passenger car.

The provisions under consideration are as follows:

8605.00.00	Railway or tramway passenger coaches, not self-propelled; luggage vans, post office coaches and other special purpose railway or tramway coaches, not self-propelled (excluding those of heading 8604) * * * 17.6 percent
* * * * * * *	
8607	Parts of railway or tramway locomotives or rolling stock:
	Other:
8607.99	Other:
8607.99.10	For vehicles of heading 8605 or 8606, except brake regulators * * * 5 percent

Issue:

Whether the imported carbodies, as described, are incomplete or unfinished railway or tramway passenger coaches for tariff purposes.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 2(a) provides that any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article, whether imported unassembled or not, has the essential character of the complete or finished article.

The **Harmonized Commodity Description And Coding System Explanatory Notes (ENs)** constitute the Customs Cooperation Council's official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the notes should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

We noted in *HQ* 089208 and *HQ* 952234 that a railway or tramway passenger coach is a wheeled rail vehicle designed to carry passengers, primarily for day travel. As designed, a complete or finished coach would ordinarily comprise the structural shell outfitted with seats and other customary furnishings relative to passenger comfort, sometimes supported by an underframe, and tracks consisting of the wheels, axles and brakes, plus pneumatic and electric subassemblies. We concluded in the cited decisions that the imported components were the aggregate of distinctive component parts which identified the importations as wheeled rail vehicles designed to carry passengers, and that, as imported, the components were clearly dedicated to making completed passenger railcars.

We have reconsidered this matter and are now of the opinion that in the cited decisions undue reliance may have been placed on legal principles developed under the HTSUS predecessor tariff code, the Tariff Schedules of the United States. While we recognize that on a case-by-case basis administrative and judicial decisions under a prior nomenclature can be instructive in interpreting provisions of the HTSUS this is not the case here. We also believe that the characterization of a railway passenger coach first and foremost as a vehicle capable of a transport function must be more fully considered. In this latter regard, the **General Explanatory Notes (EN)** to Chapter 86 state, at p. 1414, that incomplete or unfinished vehicles are classified with the corresponding complete or finished vehicles,

provided they have the essential character thereof. The note then lists examples of vehicles that would be considered incomplete or unfinished for tariff purposes. However, the **EN** then continues by stating that bodies of motorized railway or tramway coaches, of vans, wagons or trucks, or of tenders, not mounted on underframes, are classified as parts of railway or tramway locomotives or rolling stock (heading 86.07). For these reasons, it is now our position that the railway carbodies in *HQ* 089208 and *HQ* 952234 do not have the essential character of complete or finished railway passenger coaches not self-propelled.

Holding:

Under the authority of GRI 1, the railway carbodies are provided for in heading 8607. They are classifiable in subheading 8607.99.10, HTSUS.

Effect on Other Rulings:

HQ 089208, dated December 26, 1991, and *HQ* 952234, dated July 27, 1992, are revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A VIDEO IMAGE PROCESSOR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a video image processor for the EVA 2000, an automatic road surveillance device. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before July 14, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a video image processor for the EVA 2000, an automatic road surveillance device.

In New York Ruling Letter (NY) 897116, crated June 29, 1994, a video image processor was held to be classifiable under subheading 9031.40.80, Harmonized Tariff Schedule of the United States (HTSUS), which provides for optical measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter. NY 897116 is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that the video image processor is classifiable under 9031.80.00, HTSUS, which provides for other (non-optical) measuring or checking instruments, appliances and machines, not specified or included elsewhere in this Chapter. Therefore, Customs intends to revoke NY 897116 to reflect the proper classification of the video image processor under this subheading. Proposed *HQ* 957326 revoking NY 897116 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: May 30, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 29, 1994.

CLA–2–90:S:N:N3:114 897116
Category: Classification
Tariff No. 9031.40.8080

MR. RENATO G. MARTINEZ
EVA, INC.
300 Montgomery Street
Suite 633
San Francisco, CA 94104

Re: The tariff classification of video image processors for measuring traffic variables from Spain.

DEAR MR. MARTINEZ:

In your letter dated April 8, 1994 you requested a tariff classification ruling.

The EVA 2000 is an automatic road surveillance device. It operates by analyzing video images provided by video cameras installed on the road network. The EVA 2000 measures the following traffic variables: count, volume, density, average speed, occupancy, and average spatial headway.

You have indicated in a letter dated May 13, 1994 that the video processor for the EVA 2000 will be imported. It is designed for use in measuring traffic variables; the video processor contains dedicated printed circuit boards with electronic components which perform these measurements. The video camera(s) and the connecting cable will not be imported in the same shipment with the video processor.

The applicable subheading for the EVA 2000 Video Image Processor for Measuring Traffic Variable will be 9031.40.8080, Harmonized Tariff Schedule of the United States (HTS), which provides for measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; other optical instruments and appliances; other; other. The rate of duty will be 10 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transactions.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 C:R:C:M 957326 LTO
Category: Classification
Tariff No. 9031.80.00

MR. RENATO MARTINEZ
EVA, INC.
300 Montgomery Street
Suite 633
San Francisco, CA 94104

Re: Video image processor for EVA 2000; HQ 087077, 087498, 089391, 953551; NY 897116 *revoked;* Section XVI, note 1(m); optical; chapter 90, note 3; section XVI, note 4; functional unit; heading 8473; *U.S. v. Corning Glass Works.*

DEAR MR. MARTINEZ:

This is in response to your letter of July 27, 1994, requesting reconsideration of NY 897116, issued to you on June 29, 1994, concerning the classification of a video image processor for the EVA 2000, an automatic road surveillance device, under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was referred to this office for a response.

Facts:

The article in question is a video image processor for the EVA 2000, an automatic road surveillance device. The EVA 2000 operates by analyzing video images provided by video cameras installed on the road network. The device measures the following traffic variables: count, volume, density, average speed, occupancy and average spatial headway.

The video image processor is designed for use in measuring traffic variables. The processor contains dedicated printed circuit boards with electronic components which perform these measurements. The video cameras and connecting cables will not be imported in the same shipment with the video processor.

In NY 897116, the video image processor was held to be classifiable under subheading 9031.40.80, HTSUS, which provides for optical measuring or checking instruments, appliances and machines, not specified or included elsewhere. You contend that the device is classifiable under subheading 8473.30, HTSUS, which provides for parts and accessories of the automatic data processing machines of heading 8471, HTSUS.

Issue:

Whether the EVA 2000 automatic road surveillance device is classifiable as a part for an automatic data processing machine under heading 8473, HTSUS, or as a measuring or checking instrument, appliance or machine under heading 9031, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the Customs Co-operation Council's official interpretation of the Harmonized System. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

Note 1(m) to section XVI, HTSUS, states that the section, which includes chapters 84 and 85, does not cover articles of chapter 90. Thus, if the EVA 2000 is classifiable under heading 9031, HTSUS, it cannot be classified in a section XVI heading.

The EVA 2000 consists of a video image processor, video camera(s) and connection cables. If imported together, the components of the EVA 2000 would constitute a "func-

tional unit." Note 3 to chapter 90, HTSUS, states that the provisions of note 4 to section XVI, HTSUS, apply to chapter 90. Note 4 to section XVI Provides as follows:

> Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute to a clearly defined fiction covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

Heading 9031, HTSUS, provides for measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter. The EVA 2000 is a traffic surveillance device that measures the following traffic variables: count, volume, density, average speed, occupancy and average spatial headway. Thus, the individual components of the EVA 2000 contribute together to a clearly defined function described by heading 9031, HTSUS, and the device, if imported complete, would be classified under this heading. Specifically, the EVA 2000 would be classified under subheading 9031.40.60, HTSUS, which provides for optical measuring instruments. *See* Additional U.S. Note 3 to chanter 90.

The EVA 2000's video image processor, however, is not, by itself, an optical instrument. *See* HQ 087077, dated March 27, 1991 (wherein we stated that there are no HTSUS legal notes or ENS that provide for "unfinished" functional units). Moreover, while the processor cannot, by itself, perform a measuring function, it is used in the process of measuring or checking and can be classified as a measuring instrument. *See* HQ 953551, dated May 10, 1993; HQ 089391, dated February 6, 1992; HQ 087498, dated October 9, 1990; *U.S. v. Corning Glass Works*, 66 CCPA 25, 586 F.2d 822 (1978). Thus, the video image processor is classifiable under subheading 9031.80.00, HTSUS, which provides for other measuring instruments.

Holding:

The EVA 2000's video image processor is classifiable under subheading 9031.80.00, HTSUS, which provides for other measuring instruments, appliances and machines, not specified or included elsewhere in this chapter. The corresponding rate of duty for articles of the subheading is 4.3% *ad valorem*.

NY 997116, dated June 29, 1994, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 10, 12, 102, 134, and 177

RIN 1515–AB19

RIN 1515–AB34

RULES FOR DETERMINING THE COUNTRY OF ORIGIN OF A GOOD FOR PURPOSES OF ANNEX 311 OF THE NORTH AMERICAN FREE TRADE AGREEMENT; RULES OF ORIGIN APPLICABLE TO IMPORTED MERCHANDISE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On May 5, 1995, Customs published in the Federal Register a notice of proposed rulemaking that (1) set forth proposed amendments to the interim Customs Regulations establishing rules for determining when the country of origin of a good is one of the parties to the North American Free Trade Agreement for purposes of Annex 311 of that Agreement and (2) republished, with some modifications, proposed amendments to the Customs Regulations to provide uniform rules governing the determination of the country of origin of imported merchandise. This document extends for an additional 30 days the period of time within which interested members of the public may submit comments on the proposed amendments.

DATES: Comments must be received on or before July 19, 1995.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, DC 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Sandra Gethers, Office of Regulations and Rulings (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 5, 1995, Customs published in the Federal Register (60 FR 22312) a notice of proposed rulemaking that (1) set forth proposed

amendments to the interim Customs Regulations, published in the Federal Register on January 3, 1994, as T.D. 94–4, which established the rules for determining when the country of origin of a good is one of the parties to the North American Free Trade Agreement for purposes of Annex 311 of that Agreement and (2) republished, with some modifications, proposed amendments to the Customs Regulations to set forth uniform rules governing the determination of the country of origin of imported merchandise, which also had been published in the Federal Register on January 3, 1994. The document solicited public comments that were to be received on or before June 19, 1995.

Customs has been requested to extend the period of time for comments in order to afford interested parties additional time to study the proposed regulatory changes and prepare responsive comments. Customs believes that it would be appropriate to grant the request. Accordingly, the period of time for the submission of comments is being extended 30 days.

Dated: May 30, 1995.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, June 5, 1995 (60 FR 29520)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–95)

SIGMA CORP., SOUTHERN STAR, INC., CITY PIPE AND FOUNDRY, INC., LONG BEACH IRON WORKS, INC., OVERSEAS TRADE CORP., GUANGDONG METALS & MINERALS IMPORT & EXPORT CORP., U.S. FOUNDRY & MANUFACTURING CO., ALHAMBRA FOUNDRY, INC., ALLEGHENY FOUNDRY, CO., BINGHAM & TAYLOR DIV., VIRGINIA INDUSTRIES INC., CHARLOTTE PIPE & FOUNDRY CO., DEETER FOUNDRY INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., OPELIKA FOUNDRY CO., INC., TYLER PIPE INDUSTRIES, INC., AND VULCAN FOUNDRY, INC., PLAINTIFFS, AND U.V. INTERNATIONAL, PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND GUANGDONG METALS & MINERALS IMPORT & EXPORT CORP., AND U.S. FOUNDRY AND MANUFACTURING CO., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 92–04–00283

Plaintiff and defendant-intervenors challenge the Department of Commerce, International Trade Administration's ("Commerce") redetermination on remand filed in this case, claiming it was not in accordance with law and unsupported by substantial evidence.

Held: This case is further remanded for Commerce to eliminate from its surrogate value for pig iron used to produce castings in the People's Republic of China the Indian tariff category of pig iron containing greater than 0.5 percent phosphorus content. In all other respects, Commerce acted in accordance with law and was supported by substantial evidence and this case is dismissed.

[Case remanded and dismissed.]

(Dated May 23, 1995)

White & Case (Walter J. Spak and *Vincent Bowen)* for plaintiffs Sigma Corporation, Southern Star, Inc., City Pipe and Foundry, Inc. and Long Beach Iron Works and plaintiff-intervenor U.V. International.

Ross & Hardies (Jeffrey S. Neeley) for plaintiff Overseas Trade Corporation.

Cameron & Hornbostel (Dennis James, Jr.) for plaintiff and defendant-intervenor Guangdong Metals & Minerals Import & Export Corporation.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Mary T. Staley and *Robin H. Gilbert)* for plaintiffs and defendant-intervenors U.S. Foundry & Manufacturing Co., Alhambra Foundry, Inc., Allegheny Foundry Co., Bingham & Taylor Division, Virginia Industries, Inc., Charlotte Pipe & Foundry Co., Deeter Foundry Inc., East Jordan Iron Works, Inc.,

Lebaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Opelika Foundry Co., Inc., Tyler Pipe Industries, Inc. and Vulcan Foundry, Inc.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Cynthia B. Schultz);* of counsel: *Jeffery C. Lowe,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiff Guangdong Metals & Minerals Import and Export Corporation ("Guangdong") and defendant-intervenors U.S. Foundry & Manufacturing Co., Alhambra Foundry, Inc., Allegheny Foundry Co., Bingham & Taylor Division, Virginia Industries, Inc., Charlotte Pipe & Foundry Co., Deeter Foundry Inc., East Jordan Iron Works, Inc., Lebaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Opelika Foundry Co., Inc., Tyler Pipe Industries, Inc. and Vulcan Foundry, Inc. ("defendant-intervenors" or "domestic industry") challenge as unsupported by substantial evidence and not in accordance with law the Department of Commerce, International Trade Administration's ("Commerce") redetermination on remand filed in this case, *Final Remand Determination Concerning Iron Construction Castings from the People's Republic of China Pursuant to Slip Op. 93–238 ("Remand Results").* Specifically, Guangdong contests Commerce's use of import data based on cost and freight values. Defendant-intervenors contest Commerce's use of Indian import statistics to value the pig iron factor of production and revision of the best information available ("BIA") rate.

BACKGROUND

In *Sigma Corp. et al. v. United States,* 17 CIT ____, 841 F. Supp. 1275 (1993), the Court remanded this case for Commerce to reconsider its use of Indian pig iron and scrap iron prices to value Chinese pig iron foreign market value, to recalculate freight costs using the actual information on the record which was submitted by respondents, and to assess duties for China National Machinery Import and Export Corporation ("Machimpex"), Liaoning at the 11.66 percent deposit rate that was paid upon importation.

Commerce filed the Remand Results on April 1, 1994. Oral argument was held on November 22, 1994.

DISCUSSION

Commerce's final results filed pursuant to a remand will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *Use of Indian Pig Iron and Scrap Prices:*

Guangdong concurs in the Remand Results regarding import statistics to value pig iron and scrap. Guangdong agrees with Commerce's decision to use Indian import statistics. *Plaintiff Guangdong Minmetals' Comments on Results of Remand and Request for Further Remand ("Guangdong's Brief")* at 1–2.

Domestic industry asserts Commerce has not adequately supported its use of Indian pig iron import statistics because pig iron imports were controlled by the Indian government, the import categories used do not reasonably represent the more expensive grade of pig iron used to produce castings and result in an unlawful understatement of constructed value, and the average unit values from the Indian import statistics were substantially lower than every other pig iron price obtained by Commerce from other nations. Alternatively, domestic industry argues that, even if the statistics are acceptable, Commerce should have used the proper tariff category that includes the product used to manufacture castings. In addition, domestic industry argues Commerce should be required to adjust the import statistics to reflect ex-factory prices, asserting all costs associated with the cost of importation should remain in the value used, such as customs duties, brokerage and handling fees and licensing fees. *Domestic Industry's Comments on the Commerce Department's Remand Results ("Domestic Industry's Brief")* at 3–15.

Commerce concurs with the domestic industry in that Commerce requests a remand so that it may rely only upon the Indian tariff category for non-alloy pig iron containing less than 0.5 percent phosphorus as a surrogate value for pig iron used to produce castings in the People's Republic of China ("PRC"). However, Commerce argues that there is no evidence on the record which suggests that the government of India exerts control over the import price of pig iron *into* India. In addition, Commerce asserts it properly did not include costs for customs duties and other possible add-ons in the price of pig iron imported into India. *Defendant's Response to Plaintiffs' Comments upon Commerce's Final Results of Redetermination ("Defendant's Brief")* at 2–12.

This Court agrees with Commerce and, for the reasons set out below, remands this issue for Commerce to rely only upon the Indian tariff category for non-alloy pig iron containing less than 0.5 percent phosphorus as a surrogate value for pig iron used to produce castings in the PRC.

This Court remanded this case to Commerce with the following instructions regarding the use of Indian pig iron and scrap prices:

> Commerce has not adequately refuted plaintiffs' allegations of subsidies and government involvement in the industry. Therefore, this case is remanded to Commerce to reconsider its use of Indian pig iron and scrap iron prices to value Sigma's and Guangdong Minmetals' foreign market value.

Sigma Corp., 17 CIT at ___, 841 F. Supp at 1279.

On remand, Commerce reversed its position. It determined it should rely upon publicly available published import statistics of pig and scrap

iron imported into India. *Remand Results* at 2–5. The primary reason Commerce considers import statistics to be a preferable source of obtaining information for the purpose of valuing a respondent's factors of production is that the data is published, whereas actual prices are not. *Id.* This Court has repeatedly upheld reliance upon import statistic data as a reasonable surrogate value. *See, e.g., Tehnoimportexport v. United States,* 16 CIT 13, 783 F. Supp. 1401 (1992).

Commerce relied upon two basket categories of import prices for non-alloy pig iron, the tariff category containing greater than 0.5 percent phosphorus and the tariff category containing less than 0.5 percent phosphorus. In relying upon this data, Commerce failed to properly consider whether using both categories was reasonably reflective of the price of pig iron used to manufacture castings in the PRC. *Defendant's Brief* at 3. The content of phosphorus in pig iron is significant because the higher the phosphorus content, the more brittle and less usable for iron castings the pig iron will be. The maximum strength obtained is from pig iron containing 0.25 to 0.40 percent phosphorus. U.S. Steel, *The Making, Shaping and Treating of Steel* 1222–23 (10th ed.); *Defendant's Brief* at 4–5. Accordingly, this Court finds that it would not be reasonable to value the pig iron used to produce castings in the PRC using a basket category of prices that includes pig iron containing greater than 0.5 percent phosphorus.

Further, this Court finds Commerce properly did not include costs for customs duties and other add-ons because, with regard to duties and indirect taxes, India operates a duty draw back system that rebates the amount of duties paid on input materials when the finished product is re-exported. *See Sigma Corp.,* 17 CIT at ____, 841 F. Supp. at 1278–79. Because Commerce is seeking to obtain a surrogate value for the finished product as exported, Commerce properly presumed that any duties and indirect taxes collected upon importation into India are rebated upon exportation of the finished product. Further, defendant-intervenors have presented no evidence to demonstrate that any other additions, aside from freight, are made to the price of pig iron imported into India.

In all other respects, this Court affirms Commerce's choice of surrogate value in Indian import statistics and finds domestic industry's arguments to be without merit. *See Tehnoimportexport,* 16 CIT 13, 783 F. Supp. 1401.

Therefore, this Court hereby remands this issue for Commerce to eliminate from its surrogate value for pig iron used to produce castings in the PRC the Indian tariff category of pig iron containing greater than 0.5 percent phosphorus content.

2. *Inland Freight Calculations:*

This Court remanded this issue with instructions that Commerce recalculate freight costs using the information on record which was submitted by respondents, rather than best information available. *Sigma Corp.,* 17 CIT at ____, 841 F. Supp. at 1280.

Accordingly, on remand, Commerce divided each of the "data zone" freight rates used in the final results by the maximum number of kilometers to which each such freight rate applied to arrive at metric ton per kilometer rates. Commerce then multiplied the appropriate rate so calculated by each distance provided by plaintiffs to arrive at the freight costs used in calculations of foreign market value and United States price. *Remand Results* at 7.

Guangdong asserts that, because Indian import statistics are based on cost and freight values, freight on material inputs must be adjusted to avoid double counting of freight. These statistics already include inland freight from the factory to the port in the country of exportation and ocean freight from the country of exportation to India. Guangdong asserts that to additionally include inland freight in India, from the port to the factory, is to double count freight. Guangdong requests a remand for Commerce to remove the "freight cost" column in the calculation of foreign market value (thereby not separately adding freight to the input values) or by adding actual freight to the values and then deducting the freight element that is in the import statistics. *Guangdong's Brief* at 2–6.

Domestic industry asserts Commerce properly added freight costs to the import data because the freight costs included in the import statistics do not include the inland freight costs of getting the materials from the port in India to the foundry. *Domestic Industry's Response to Guangdong Minmetals' Comments on Commerce Department's Remand Results ("Domestic Industry's Response")* at 2–3. Commerce echoes the argument made by domestic industry. *Defendant's Brief* at 12–16.

This Court agrees with Commerce and the defendant-intervenors. The import statistics do not include all the freight costs incurred to get the materials to the factory door. As the freight costs only include the inland freight in the exporting country and the ocean freight to get the materials from the exporting port to the Indian port, Commerce acted reasonably in adding the Indian inland freight costs of getting the materials from the port in India to the foundry. Therefore, this Court hereby affirms Commerce's action on this issue.

3. *Best Information Available:*

This Court remanded this issue with instructions that Commerce assess antidumping duties for Machimpex at the 11.66 percent deposit rate paid upon importation as Machimpex was not given adequate notice that it was subject to review. *Sigma Corp.*, 17 CIT at ____, 841 F. Supp. at 1283.

Accordingly, on remand, Commerce complied with the order of the Court. *Remand Results* at 7–9.

Because this Court remanded this case only for Commerce to reconsider the value of pig iron and scrap for exports, to recalculate freight costs and to change the assessment of duties against Machimpex, and because no parties have challenged the BIA rate in this proceeding, domestic industry asserts the current BIA rate must stand. Domestic

industry contends that once this judgment is made final and liquidation is no longer suspended, all entries, other than those from Guangdong or Machimpex, should be liquidated at the BIA rate of 92.74 percent. *Domestic Industry's Brief* at 15–16.

Commerce agrees that, because the all-others rate was not challenged before the Court following issuance of the final results of review, it is not subject to revision now. *Defendant's Brief* at 16.

The Court fails to see why this issue was raised, but agrees with domestic industry and Commerce. Thus, this Court affirms Commerce's compliance with its remand instructions. *See Sigma Corp.*, 17 CIT at ____, 841 F. Supp. at 1283.

CONCLUSION

In accordance with the foregoing opinion, this Court, after due deliberation and a review of all papers in this action, hereby remands this case to Commerce to eliminate from its surrogate value for pig iron used to produce castings in the People's Republic of China the Indian tariff category of pig iron containing greater than 0.5 percent phosphorus content. In all other respects, Commerce acted in accordance with law and was supported by substantial evidence and this case is dismissed.

(Slip Op. 95–96)

STALEXPORT AND HUTA CZESTOCHOWA, RAUTARUUKKI OY, METALEXPORTIMPORT S.A., FABRIQUE DE FER DE CHARLEROI, S.A., U.S. STEEL GROUP, A UNIT OF USX CORP., BETHLEHEM STEEL CORP., GENEVA STEEL, GULF STATES STEEL, INC. OF ALABAMA, INLAND STEEL INDUSTRIES, INC., LUKENS STEEL CO., SHARON STEEL CORP., AND AG DER DILLINGER HUTTENWERKE, PLAINTIFFS, AND S.A. FORGES DE CLABECQ, PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND U.S. STEEL GROUP, A UNIT OF USX CORP., BETHLEHEM STEEL CORP., GENEVA STEEL, GULF STATES STEEL, INC. OF ALABAMA, INLAND STEEL INDUSTRIES, INC., LUKENS STEEL CO., SHARON STEEL CORP., USINOR SACILOR, SOLLAC AND GTS, POHANG IRON & STEEL CO., LTD., FABRIQUE DE FER DE CHARLEROI, S.A., AG DER DILLINGER HUTTENWERKE, ILVA, S.P.A., AND ILVA USA, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 93–09–00553–INJ

Plaintiffs Stalexport and Huta Czestochowa, Rautaruukki Oy, Metalexportimport S.A. and Fabrique de Fer de Charleroi, S.A., respondents below (collectively "Respondents"), challenge the United States International Trade Commission's (the "Commission") affirmative final determination that an industry in the United States producing cut-to-length carbon steel plate ("plate") is materially injured by reason of less than fair value imports of plate from Belgium, Poland, Finland and Romania and by subsidized plate imports from Belgium. *Certain Flat-Rolled Carbon Steel Products From Argentina, Australia, Austria,*

Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom ("Final Determination"), USITC Pub. No. 2664 at 211, Inv. Nos. 701–TA–319–332, 334, 336–342, 344 and 347–353 and Inv. Nos. 731–TA–573–579, 581–592, 594–597, 599–609, and 612–619 (Aug. 1993) (final determ.); 58 Fed. Reg. 43,905 (1993).

Plaintiffs and petitioners below, U.S. Steel Group, a Unit of USX Corporation, Geneva Steel, Gulf States Steel, Inc. of Alabama, Sharon Steel Corporation, Bethlehem Steel Corporation, Inland Steel Industries, Inc. and Lukens Steel Company (collectively "Petitioners"), challenge the Commission's negative final determination that the domestic plate industry is neither materially injured nor threatened with material injury by reason of less than fair value and subsidized imports of plate from France and Korea. *Id.*

Held: The Court sustains the Commission's decision to cumulate cut-to-length plate imports from Belgium, Poland, Finland and Romania in its final material injury analysis and its decision to exclude plate imports from France and Korea from cumulation pursuant to the negligible imports exception.

[Respondents' motions denied; Petitioners' motion denied; case dismissed.]

(Dated May 23, 1995)

Herzfeld & Rubin, P.C. (Theodore Ness and *Christian Hammerl)* for plaintiffs, Stalexport and Huta Czestochowa.

Popham, Haik, Schnobrich & Kaufmann, Ltd. for plaintiff Rautaruukki Oy.

Ackerson & Bishop Chartered (Frederick P. Waite, Stewart A. Block and *M. Roy Goldberg)* prior representation for plaintiff Rautaruukki Oy.

deKieffer Dibble & Horgan (J. Kevin Horgan) for plaintiff Metalexportimport S.A.

LeBoeuf, Lamb, Greene & MacRae (Melvin S. Schwechter) for plaintiff-intervenor S.A. Forges de Clabecq.

Barnes, Richardson & Colburn (Gunter von Conrad, Peter A. Martin and *Mark T. Wasden)* for plaintiff/defendant-intervenor Fabrique de Fer de Charleroi, S.A.

Dewey Ballantine (Alan Wm. Wolff and *Michael H. Stein)* and *Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan, Stephen J. Narkin* and *M.J. Mace)* for plaintiffs/defendant-intervenors, U.S. Steel Group, a Unit of USX Corporation, Geneva Steel, Gulf States Steel, Inc. of Alabama, Sharon Steel Corporation, Bethlehem Steel Corporation, Inland Steel Industries, Inc. and Lukens Steel Company.

LeBoeuf, Lamb, Greene & MacRae (Pierre F. de Ravel d'Esclapon and *Mary Patricia Michel)* for plaintiff/defendant-intervenor AG der Dillinger Huttenwerke.

Lyn M. Schlitt, General Counsel, United States International Trade Commission, *James A. Toupin*, Deputy General Counsel, Office of the General Counsel *(James M. Lyons, Scott D. Anderson, Cynthia P. Johnson* and *Kathryn A. Gilchrist)* for defendant.

Weil, Gotshal & Manges (Jeffrey P. Bialos, Angela J. Paolini Ellard, Martin S. Applebaum and *A. Paul Victor)* for defendant-intervenor Usinor Sacilor, Sollac and GTS.

Morrison & Foerster (Donald B. Cameron, G. Brian Busey, Craig A. Lewis and *M. Diana Helweg)* for defendant-intervenor Pohang Iron & Steel Co., Ltd.

Rogers & Wells (William Silverman and Ryan Trainer) for defendant-intervenor ILVA, S.p.A. and ILVA USA, Inc.

OPINION

TSOUCALAS, *Judge:* This action is before the Court on plaintiffs' motions for judgment on the administrative record pursuant to Rule 56.2 of the Rules of this Court. Foreign plaintiffs Stalexport and Huta Czestochowa ("Stalexport"), a Polish plate exporter and a Polish plate steel mill, respectively; Metalexportimport S.A. ("Metalexportimport"), a Romanian steel exporter; Rautaruukki Oy ("Rautaruukki"), a Finnish plate producer; and Fabrique de Fer de Charleroi, S.A. ("Charleroi"), a Belgian plate producer, (collectively "Respondents"), challenge the United States International Trade Commission's (the "Commission" or the "ITC") affirmative final determination that an industry in the

United States producing plate is materially injured by reason of less than fair value ("LTFV") cut-to-length steel plate products ("plate") from Belgium, Poland, Finland and Romania and by subsidized plate imports from Belgium. Respondents contend that the Commission erroneously cumulated Belgian, Polish, Finnish and Romanian plate imports in its material injury analysis. The views of the Commission[1] are contained in *Certain Flat-Rolled Carbon Steel Products From Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom ("Final Determination")*[2], USITC Pub. No. 2664 at 211, Inv. Nos. 701–TA–319–332, 334, 336–342, 344 and 347–353 and Inv. Nos. 731–TA–573–579, 581–592, 594–597, 599–609 and 612–619 (Aug. 1993) (final determ.); 58 Fed. Reg. 43,905 (1993).[3] Domestic producers of plate, U.S. Steel Group, a Unit of USX Corporation, Geneva Steel, Gulf States Steel, Inc. of Alabama, and Sharon Steel Corporation ("U.S. Steel Group"); and Bethlehem Steel Corporation, Inland Steel Industries, Inc. and Lukens Steel Company ("Bethlehem Group"), (collectively "U.S. Steel Group *et al.*"), appear in support of the government.

Petitioners below, U.S. Steel Group *et al.* as plaintiffs (collectively "Petitioners"), oppose the Commission's negative material injury final determination for LTFV and subsidized plate products from France and Korea.[4] *Id.* Petitioners allege that the Commission erroneously excluded French and Korean plate imports from cumulation in its material injury analysis. Defendant-intervenors Usinor Sacilor, Sollac and GTS ("Usinor") and Pohang Iron & Steel Co., Ltd., appear in support of the government.

The plate at issue was identified by Commerce as a separate "class or kind" of merchandise subject to investigation and described as follows:

> *Certain Cut-to-Length Carbon Steel Plate:*
>
> These products include hot-rolled carbon steel universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coils and without patterns in relief), of rectangular shape, neither

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[1] The members of the Commission at the time of issuance of these determinations were Chairman Newquist, Vice Chairman Watson, and Commissioners Rohr, Brunsdale, Crawford and Nuzum. This opinion refers to the members of the Commission by the title "Commissioner" without regard for rank or any subsequent changes in title.

Regarding the countries at issue, the Commissioners joined portions of the relevant determinations as follows: Commissioner Nuzum joined in all portions of these determinations except that she dissented from the majority's negative determination with respect to imports from France. Commissioners Rohr and Watson joined all portions of the determinations. Commissioner Crawford joined the discussion of these determinations except the negligibility and causation analysis with respect to Poland and Romania. Commissioner Brunsdale joined these determinations through the discussion of cumulation except as it applies to Poland and Romania. She also joined the discussion of the threat of material injury, finding that an industry in the United States is not materially injured or threatened with material injury by reason of LTFV and/or subsidized imports from Poland or Romania. Threat of material injury is not an issue in these appeals. Commissioner Newquist joined only the discussion of like product, domestic industry and condition of the domestic industry. *Final Determination* at 211 n.2.

[2] This opinion will refer to Volume II of the Commission's determinations as the *Staff Report*.

[3] The Commission also found material injury by reason of cumulated imports from Brazil, Canada, Germany, Mexico, Spain, Sweden and the United Kingdom. *Id.* at 211; 58 Fed. Reg. at 43,905.

[4] Petitioners have appealed the Commission's negative determinations for plate products from France and Korea as part of consolidated case number 93–09–00553–INJ.

> clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot-rolled carbon steel flat-rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness * * *. Included in these investigations are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been "worked after rolling")—for example, products which have been bevelled or rounded at the edges. Excluded from these investigations is grade X–70 plate.

Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Argentina, 58 Fed. Reg. 37,062, 37,064 (Dep't Comm. 1993) (final determ.); *see also Final Determination* at 213.

Cut-to-length plate is generally used in construction, industries producing machinery, industrial equipment, tools, rail freight cars, shipbuilding/marine equipment, and by service centers which reportedly sell the product to construction companies. *Staff Report* at I–34, I–35, table 9.

BACKGROUND

The final determinations herein appealed are the culmination of numerous concurrent ITC investigations based on petitions filed on June 30, 1992, alleging that an industry in the United States producing cut-to-length carbon steel plate is materially injured or threatened with material injury by reason of LTFV and/or subsidized plate products from, *inter alia*, Belgium, Finland, Poland, Romania, France and Korea. These investigations encompassed twenty-one countries and covered the following four classes or kinds of imported flat-rolled carbon steel: hot-rolled carbon steel, cold-rolled carbon steel, corrosion-resistant carbon steel and cut-to-length steel plate.

On August 14, 1992, the Commission issued notice of its preliminary determination that there was a reasonable indication that the United States domestic steel plate industry was materially injured or threatened with material injury by reason of imports of allegedly subsidized and dumped steel plate from, *inter alia*, Belgium, Poland, Finland, Romania, France and Korea. *See Certain Flat-Rolled Carbon Steel Products From Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, The Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, USITC Pub. No. 2549, Inv. Nos. 701–TA–319–354 and 731–TA–573–620 (Aug. 1992) (preliminary determ.); *Certain Flat-Rolled Carbon Steel Products*, 57 Fed. Reg. 38,064 (1992).

Effective December 7, 1992 and February 4, 1993, the Commission instituted final material injury investigations under section 705(b) of the Tariff Act of 1930 (the "Act"), as amended, 19 U.S.C. § 1671d(b)

(1988), and under section 735(b) of the Act, as amended, 19 U.S.C. § 1673d(b) (1988), with respect to Belgium, Poland, Finland, Romania, France and Korea, which the Department of Commerce, International Trade Administration ("Commerce"), had preliminarily determined were being subsidized by the governments of those countries and/or were being sold in the United States at LTFV. The Commission published notices of these investigations on December 18, 1992 and February 18, 1993. *See Certain Flat-Rolled Carbon Steel Products From Austria, Belgium, Brazil, France, Germany, Italy, Korea, Mexico, New Zealand, Spain, Sweden, and the United Kingdom; Institution of Final Countervailing Duty Investigations,* 57 Fed. Reg. 60,247 (USITC 1992); *Certain Flat-Rolled Carbon Steel Products From Argentina et al.*, 58 Fed. Reg. 8,974 (USITC 1993).

The Commissioners voted on the final subsidy and LTFV investigations on July 27, 1993.

The ITC's Final Affirmative Injury Determinations:

In its preliminary investigations, the Commission found a single like product consisting of cut-to-length carbon steel plate corresponding to Commerce's single class or kind of imported steel plate and, consequently, found one domestic industry producing all steel plate.[5] *Final Determination* at 214–16.

The Commission reasoned that affirmative injury determinations were appropriate for Belgium, Poland, Finland and Romania because the domestic plate industry was materially injured as a result of the significant volume and price effects of cumulated imports.[6] *Id.* at 243. The Commission's determination took the following into consideration. During the period of investigation ("POI"), U.S. consumption fell by 11.9% and the domestic industry's market share of this decreasing apparent domestic consumption fell by 0.8 percentage points. *Id.* at 243. The domestic industry's capacity utilization also decreased by 3.9 percentage points and profitability fell from an operating income of $211 million to an operating loss of $84 million, a drop of 139.6 percentage points. *Id.* In contrast, the volume of cumulated imports as a percentage of apparent domestic consumption was relatively high, peaking in 1992, while absolute volumes of cumulated imports decreased between 1990 and 1991, before increasing again in 1992. *Id.* at 237.

Regarding the price effects of the subject imports, the Commission found that domestic cut-to-length plate was substitutable with cumulated imports of plate and that the plate market was sensitive to price.

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[5] In determining whether an industry in the United States is materially injured or threatened with material injury by reason of the subject imports, the Commission must first define the "like product" and the "industry." The statute defines "like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation * * *." 19 U.S.C. § 1677(10) (1988). In turn, the statute defines the relevant domestic industry as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product * * *." 19 U.S.C. § 1677(4)(A) (1988). The Commission is required to assess the effects of subsidized or dumped imports in relation to the United States production of the like product within that industry. 19 U.S.C. § 1677(4)(D) (1988).

[6] To determine whether material injury has occurred by reason of subsidized or LTFV imports under investigation, the Commission evaluates the volume of imports, their effect on domestic prices, the impact on domestic production of the merchandise at issue, and other relevant economic factors. 19 U.S.C. § 1677(7)(B) (1988).

Id. at 238. The Commission determined that plate was commonly produced to a few ASTM specifications, with A36 considered the most common grade and A572 and A656 grades also considered very common. *Id.* The Commission found that these three grades accounted for a majority of both U.S. producers' and cumulated importers' annual U.S. shipments. *Id.* The Commission concluded that plate did not involve particularly unique production processes and that most domestic and foreign plate mills were capable of producing plate products which met the most common ASTM specifications. *Id.* at 238–39. The Commission did not regard plate as requiring highly detailed customer specifications and saw it as generally involving no further processing once sold. *Id.* at 239. Substitutability was evidenced by pricing data which indicated that domestic and cumulated imports were documented in all four of the commercial grade pricing series and in twelve out of fifteen niche products. *Id.* The Commission also found evidence of substitutability in the form of reports from twenty-six purchasers indicating that cumulated imports of plate were comparable to domestic plate in quality, as compared with only two reports of inferior foreign product and one report of superior foreign product. *Id.* Pricing data for the commercial grade plate products also indicated that the imports cumulated showed considerably more underselling than overselling. *Id.* at 240.

In addition, pricing trends evidenced price suppression and depression by reason of the cumulated imports. *Id.* at 241. Cumulated imports routinely undersold domestic plate and the Commission confirmed considerable number of allegations of lost sales and lost revenues attributable to the cumulated subject imports. *Id.* at 242. Further, unit production costs for domestic plate rose during the POI while market prices for domestic plate declined. *Id.* at 241.

The ITC's Final Negative Injury Determination:

The Commission also concluded that negative injury determinations were appropriate for France and Korea because the domestic plate industry was not materially injured by reason of French and Korean plate imports. *Id.* at 244. The Commission based its determinations on its findings that, during the POI, French and Korean imports were insignificant in absolute volume and as a share of apparent domestic consumption. *Id.* The Commission found no persuasive evidence that French and Korean imports independently had a significant suppressing or depressing effect on domestic prices and concluded that the volume, value and market share of French and Korean imports were too small to have any significant adverse effect on domestic prices. *Id.*

Standard of Review:

The Court must uphold the Commission's determination unless it finds that the determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v.*

NLRB, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

DISCUSSION

Cumulation:

BELGIUM

Belgian respondent, Charleroi, contends that, except for the improper cumulation of South Africa's import statistics, the Commission's analysis of volume and price effects would have been based on lower absolute volumes and smaller market shares of U.S. consumption for the remaining cumulated countries and the Commission's injury analysis would have resulted in a final negative injury determination for plate. *Brief in Support of Plaintiff's Motion for Summary Judgment ("Charleroi's Brief")* at 37, 43. Charleroi does not otherwise contest any aspect of the Commission's determination regarding Belgium.

Charleroi points out that the ITC is not required to determine material injury in the case of South Africa because it is not a "country under the Agreement" within the meaning of section 701(b) of the Act. Charleroi further argues that the Commission erred in cumulating South African plate imports because such imports did not satisfy the cumulation requirements of 19 U.S.C. § 1677(7)(C)(iv) (1988 & Supp. V 1993). Essentially, Charleroi contends that South African plate imports were not "subject to investigation" and did not "compete" with other such imports and with the domestically produced like product. *Charleroi's Brief* at 1–15.

Charleroi makes several arguments in support of the position that South African plate was not subject to investigation. Specifically, Charleroi first argues that the countervailing duty investigation of South African plate imports was filed under section 303 of the Act, as amended, 19 U.S.C. § 1303 (1988), and imports investigated pursuant to section 303 are not "subject to investigation" within the statutory meaning of the cumulation provision. Charleroi asserts that 19 U.S.C. § 1677(7)(C)(iv) only applies to investigations conducted under Subtitle IV of Title 19, whereas section 303 investigations fall under Subtitle II of that title. *Id.* at 2, 22–23. In support, Charleroi argues that, as the cumulation provision is contained in the definitions section of § 1677 of Subtitle IV, it applies only to countervailing or antidumping duty investigations brought under 19 U.S.C. § 1671 or 19 U.S.C. § 1673 of Subtitle IV, *i.e.*, section 701 and 731 investigations. Charleroi contends that this is indicated by the section's introductory phrase "for purposes of this subtitle." *Charleroi's Brief* at 22.

Charleroi also contends that the differing language in the material injury provision, 19 U.S.C. § 1677(7) (1988), and the threat of material

injury provision,[7] shows that Congress intended to exclude section 303 imports from cumulation for material injury purposes. In support, Charleroi asserts that the threat provision explicitly authorizes cumulation of imports subject to investigation under sections 303, 701 and 731, to the extent practicable. Charleroi points out that the material injury provision does not similarly reference section 303. In addition, Charleroi contends that the qualifier, "to the extent practicable," in the "threat" provision indicates that Congress was not confident that it would even be possible to cumulate imports from sections 303, 701 and 731 investigations, particularly in light of the fact that section 303 investigations are not subject to injury determinations by the Commission. Charleroi suggests that cumulation was made discretionary for threat purposes due to this concern, but the injury provision is mandatory because it is restricted to imports subject to investigation under sections 701 and 731. *Charleroi's Brief* at 24–27.

Charleroi further contends that a Commerce preliminary or final subsidy or LTFV determination is a prerequisite to a Commission final material injury determination cumulating South African plate import data.[8] Charleroi points to the sequential arrangement of the trade relief laws as indicating the proper progression. *See* 19 U.S.C. §§ 1671d(a)(1), (b)(1) (1988) and 1673d(a)(1), (b)(1) (1988). *Charleroi's Brief* at 28–31.

Lastly, Charleroi alleges that the Commission's decision to cumulate South Africa import data based solely on information provided by petitioners violates principles of due process and fairness. *Id.* at 31–32.

Charleroi also argues that the record fails to support the Commission's conclusions drawn in the "general" competition analysis and the Commission's findings regarding factors assessed. *Id.* at 2, 14–17. Specifically, Charleroi argues that, as the Commission admitted it had no information indicating the grade of South African plate imports, it inaccurately found that all countries made at least some portion of their sales in the commercial grade and niche products covered by the questionnaires. Charleroi submits that without information pertaining to plate grade, the Commission could not (1) decide the "domestic like product"; (2) evaluate whether South African plate was distributed through common or similar channels as other subject imports and the domestic like product; or (3) assess pricing data, especially with respect to fungibility and assessment of over- and underselling. *Id.* at 18–19. In addition, Charleroi contends that South African plate products were not

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[7] 19 U.S.C. § 1677(7)(F)(iv) (1988 & Supp. V 1993), the threat of material injury provision, states:

> To the extent practicable and subject to subparagraph (C)(iv)(II) and (v), for purposes of clauses (i)(III) and (IV) the Commission may cumulatively assess the volume and price effects of imports from two or more countries if such imports—
>
> (I) compete with each other, and with like products of the domestic industry, in the United States market, and
>
> (II) are subject to any investigation under section 1303, 1671, or 1673 of this title.

[8] On May 13, 1993, petitioners filed a countervailing duty petition with Commerce with respect to plate from South Africa and other products. On June 10, 1993, Commerce published notice of its *Initiation of Countervailing Duty Investigations: Certain Carbon Steel Flat Products From South Africa*, 58 Fed. Reg. 32,515. On September 13, 1993, Commerce published notice of its *Preliminary Negative Countervailing Duty Determinations: Certain Steel Products From South Africa*, 58 Fed. Reg. 47,865. On November 24, 1993, Commerce published notice of its *Final Negative Countervailing Duty Determinations: Certain Steel Products From South Africa*, 58 Fed. Reg. 62,100.

present "simultaneously" with other imports and the domestic like product because they were imported during only nine months of the POI. *Id.* at 20. Charleroi argues that, absent a showing of competition, there is no causal nexus between the specific imports and injury. *Id.* at 10, 37.

Among other arguments, the Commission argues that it generally has cumulated imports even where there were alleged differences between the imports and domestic products. *See, e.g., Silicon Metal From the People's Republic of China,* USITC Pub. No. 2385 at 22–24, Inv. No. 731–TA–472 (June 1991) (final determ.). *Defendant United States International Trade Commission's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("ITC's Brief")* at 77.

In assessing whether there is present material injury to the domestic industry by reason of subsidized or LTFV imports, the Commission is mandated to cumulatively assess the volume and effects of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market. 19 U.S.C. § 1677(7)(C)(iv).

The Court disagrees with Charleroi that South African plate imports are not subject to investigation for purposes of the Commission's material injury determination. The phrase "subject to investigation" contained in the mandatory cumulation provision is neither defined in 19 U.S.C. § 1677, nor limited in any explicit way by the statute to investigations conducted under Subtitle IV.[9] Thus, the limitation Charleroi alleges in § 1677, on its face, does not apply.

Further, Charleroi's reliance on language differences in the injury and threat provisions is misplaced. First, Charleroi fails to disclose that the language originally proposed in the House of Representatives trade bill, H.R. 3, 100th Cong., 1st Sess. (1987), for cumulation with respect to present injury and threat of material injury, was identical in making cumulation applicable to imports subject to all antidumping and countervailing duty investigations.[10] Hence, it cannot be seriously argued

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[9] It is noteworthy that in *Chaparral Steel Co. v. United States,* 901 F.2d 1097 (Fed Cir. 1990) (interpreting the phrase "subject to investigation" in a countervailing duty investigation context), some of the imports at issue originated in South Africa yet the court did not consider, and no party raised, the argument presently advanced by Charleroi.

[10] Section 154 of H.R. 3 states:

> (iv) CUMULATION.—For purposes of clauses (i) and (ii), the Commission shall cumulatively assess the volume and price effects of imports from two or more countries if such imports compete with each other, and with like products of the domestic industry, in the United States market, and if such imports—
>
> (I) are subject to any investigation under section 303, 701, or 731;
>
> (II) are subject to any final order or suspension agreement resulting from an investigation under section 303, 701, or 731; or
>
> (III) were entered before any quantitative restraint was imposed, if such restraint was the basis on which a petition filed under section 303, 701, or 731 was withdrawn after the administering authority made an affirmative preliminary determination on the petition.

H.R. 3, Section 154 at 195–96. Compare the wording of the threat provision:

> (iii) CUMULATION.—To the extent practicable and subject to paragraph (C)(v), for purposes of clause (i)(III) and (IV), the Commission shall cumulatively assess the volume and price effects of imports from two or more countries if such imports—
>
> (I) compete with each other, and with like products of the domestic industry, in the United States market; and
>
> (II) are subject to any investigation under section 303, 701, or 731.

H.R. 3, Section 154 at 200.

that Congress intended to allow the cumulation of imports subject to *all* Title VII investigations only in the threat context.[11]

Second, the Committee Report reveals that the threat provision is discretionary because such determinations involve projections regarding future developments which involve difficult predictions regarding trends, and distant trends for different sources of imports might argue against cumulation.[12] The House bill was adopted but was made discretionary. The House Report on the provision in question reads as follows:

> The Committee intends, by requiring cumulation to the extent practicable in determining threat of material injury that the ITC apply the same principles regarding normal or cross-cumulation in threat determinations as it would apply in material injury determinations * * *. Moreover, the Committee recognizes the difficulty of applying the concept of cumulation to threat cases, and does not seek to require cumulation *where it is impracticable to do so because such assessment would be conjectural or speculative.*

H.R. Rep. No. 40, 100th Cong., 1st Sess., pt. 1, at 131 (1987) (emphasis added); *see Asociacion Colombiana de Exportadores v. United States*, 12 CIT 1174, 704 F. Supp. 1068 (1988).

Moreover, South African plate was subject to investigation by Commerce at the time of the Commission's final injury determination. *See Initiation of Countervailing Duty Investigations: Certain Carbon Steel Flat Products From South Africa*, 58 Fed. Reg. at 32,515. The Commission has uniformly determined that if imports are subject to Commerce investigations, the volume and price effects of such imports can be cumulated even absent a separate material injury investigation. *See Certain Fresh Cut Flowers From Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, the Netherlands, and Peru ("Certain Fresh Cut Flowers")*, USITC Pub. No. 1877, Inv. Nos. 303–TA–17–18 and 701–TA–275–278 (July 1986) (preliminary determ.). *See also Certain Forged Steel Crankshafts From the Federal Republic of Germany and the United Kingdom*, USITC Pub. No. 2014 at 14, Inv. Nos. 731–TA–351 and 353 (Sept. 1987) (final determ.) (Japanese crankshaft imports subject to an ongoing investigation by Commerce which may (or may not) result in a final determination of LTFV sales and, accordingly, are subject to investigation within the meaning of the statute); *Chaparral Steel Co.*, 901 F.2d at 1097 (imports no longer subject to a pending investigation not subject to cumulation); *United Eng'g & Forging v. United States*, 15 CIT 561, 582, 779 F. Supp. 1375, 1393 (1991), *aff'd without op.*, 996 F.2d 1236 (1993). The statute "does not require that imports be subject to an *injury* investigation for cumulation to be

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[11] The Court believes that Section 154 of H.R. 3 was not contained in the final bill because of the more controversial provisions regarding the treatment of imports subject to voluntary restraint agreements or to revocations of orders. *See Chaparral Steel Co.*, 901 F.2d at 1106.

[12] The conference report states:

> The House bill amends section 771(7) of the Tariff Act to require the ITC, in determining threat of material injury, to cumulate, to the extent practicable, the volume and price effects of imports from two or more countries if such imports are currently subject to any antidumping or countervailing duty investigation, and such imports compete with each other and with like products of the domestic industry.

H.R. Rep. No. 576, 100th Cong., 2d Sess. 620 (1988).

required." *Certain Fresh Cut Flowers,* USITC Pub. 1877 at 12, Inv. Nos. 303–TA–17–18 and 701–TA–275–278.

Therefore, South African plate imports were subject to investigation.

Charleroi's arguments concerning competition also fail. In the plate determinations, the Commission adopted the discussion of competition legal standards, as well as the discussion of the factors considered in applying those legal standards contained in § IV(A) of the Commission's views on hot-rolled carbon steel. *See Final Determination* at 219 referring to the Commission's views at 24–27 (discussion of competition-related requirements concerning cumulation). Accordingly, in assessing whether a reasonable overlap of competition existed, the Commission evaluated: (1) the degree of fungibility among imports and with the domestic like product; (2) the presence of sales or offers to sell in the same geographical markets; (3) the existence of common or similar channels of distribution; and (4) whether the products were simultaneously present in the market.[13] *Final Determination* at 24–25 n.103. *See also United Eng'g & Forging,* 15 CIT at 582, 779 F. Supp. at 1393; *Fundicao Tupy S.A. v. United States,* 12 CIT 6, 10–11, 678 F. Supp. 898, 902, *aff'd,* 859 F.2d 915 (Fed. Cir. 1988). These factors are not exhaustive and no single factor is determinative. *Wieland Werke, AG v. United States,* 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989). Further, only a "reasonable overlap" of competition is required. *Id.* at 563, 718 F. Supp. at 52 (completely overlapping markets are not required); *Granges Metallverken AB v. United States,* 13 CIT 471, 477, 716 F. Supp. 17, 21–22 (1989) (the Commission need not track each sale of individual sub-products and their counterparts to show competition, but need only find evidence of reasonable overlap of competition).

In the competition discussion which was adopted, the Commission noted that plate quality was an important element of fungibility.[14] The Commission observed that it assessed the fungibility of the subject imported products, *i.e.,* their relative substitutability with the domestic and imported products, in part, by considering pricing data on commercial grade and niche products obtained from its questionnaires. *Final Determination* at 26–27. The Commission viewed consistent and significant price differentials, underselling or overselling, between what otherwise should be comparable domestic and imported products, as some evidence tending to show a lack of competition.[15] *Id.* However, the Commission observed that not all price differences can be explained by differences in the merchandise, that different pricing does not necessarily reflect differences in merchandise, and that nonprice considerations can also affect competition in the marketplace. *Id.*

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[13] Commissioner Rohr took no position with respect to South Africa. *Final Determination* at 24 n.102.

[14] Commissioners Rohr and Nuzum noted, however, that while they took quality differences among products into account in determining the existence of competition, they considered perceived quality differences to be less important than other factors. *Id.* at 26 n.118.

[15] Commissioner Rohr did not view the margins of over- and underselling to be probative of the presence or absence of competition. *Id.* at 27 n.122. Commissioner Nuzum noted that overselling alone is not sufficient to establish a lack of competition, and that imports may have adverse effects even though they oversell the domestic product. *Id.* at 27 n.123.

In its cumulation discussion concerning plate, the Commission found that (1) each of the fourteen countries investigated sold at least some of the same commercial grade and/or niche products as did the rest of the group of countries; (2) imports of commercial grade and/or niche products from each country were present in the market with comparable domestic product; (3) where there was no comparable domestic production, niche products constituted a very small percentage of imports from any one country; (4) imports and domestic like products were sold through the same channels of distribution, *i.e.*, were sold to end users and steel service distribution centers; and (5) plate products from all fourteen countries were imported into the United States in most, if not all, months of the POI; were sold in at least two of the four regions of the United States during the POI; and, the majority of imports from most countries were sold in all four regions. *Final Determination* at 220.

Therefore, the Commission reasonably concluded that, before cumulation, a reasonable overlap of competition existed between plate imports from each of the fourteen countries[16] subject to the investigation and with the domestic products. *See id.*

Charleroi's allegation that the decision to cumulate South Africa was based solely on information from petitioners, mischaracterizes the information before the Commission. In the country specific cumulation discussion, the Commission made findings particular to South Africa which support a finding of competition.

Although South African plate imports entered the United States during the POI beginning in March 1992, they were not isolated. South African plate was present in all four geographic regions of the United States, the East, Gulf, Great Lakes, and West customs districts, through seven plate importers, all of whom were steel distribution centers. *Id.* at 233. South African plate accounted for 1.6% of apparent share of domestic consumption, more than any other subject country except Sweden and Canada. *Staff Report* at I–142, table 101. Further, South Africa was the third largest exporter of plate products to the U.S. market in 1992. *Id.* at I–133, table 93. Although South Africa had no imports in 1990 and 1991, South Africa shipped almost 80,000 tons of plate into the United States in 1992. *Id.* At a dollar value of $26 million, these imports were not insignificant.[17] *Id.* at I–133, table 93. Hence, there was substantial evidence supporting the Commission's finding of a sufficient overlap of competition between South African plate imports, other subject imports, and domestically produced plate.

Admittedly, the Commission had no specific information concerning the grades of plate products which made up South African imports, *i.e.*, information indicating whether they were commercial or specialized niche products. *Final Determination* at 233. However, it reasoned that the low unit values of South African plate imports, the third lowest of the subject countries, suggested that South African products were not

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[16] South Africa was not among the fourteen countries investigated.

[17] There were no imports from South Africa in October 1992. *Final Determination* at 233 n.203.

specialized plate products that commanded a price premium.[18] *Id.* Commissioner Rohr made the following observations regarding plate:

> [P]late is the least differentiated and specialized of the four product categories. It is the most commodity-like. As the majority notes, a very large percentage of this product category is sold in a few, long established, well known grades in [sic] which are produced by most domestic and foreign producers.

Id. (Additional and Dissenting Views of Commissioner Rohr) at 255. Thus the plate entering the domestic market was within a limited range of products and the Commission had no reason to believe that South African plate product was any different.

Hence, the Commission was justified in relying on pricing data to conclude that South African plate imports were likely to be of the commercial grade categories which comprised the bulk of plate imports from the other countries included in these investigations. Moreover, the court has accepted the Commission's practice of finding a reasonable overlap of competition in spite of perceived product quality differences and despite one product commanding a premium price. *See Metallverken Nederland B.V. v. United States,* 13 CIT 1013, 1025, 728 F. Supp. 730, 740 (1989) (de-emphasizing the importance of quality differences and, therefore, price differences). Likewise, the Commission was justified in basing its decision on the channels of distribution through which such imports were distributed. Therefore, South African plate competed.

Accordingly, the Court finds that, based on the record taken as a whole, the Commission properly cumulated the volume and price effects of plate imports from South Africa in its injury analysis.

Negligibility:

Cumulation is discretionary if imports of the investigated product are negligible and have no discernible adverse impact on the domestic industry. 19 U.S.C. § 1677(7)(C)(v) (1988). For purposes of determining whether imports are negligible, the Commission shall evaluate all relevant economic factors regarding the imports, including, but not limited to, whether—

> (I) the volume and market share of the imports are negligible,
> (II) sales transactions involving the imports are isolated and sporadic, and
> (III) the domestic market for the like product is price sensitive by reason of the nature of the product, so that a small quantity of imports can result in price suppression or depression.

19 U.S.C. § 1677(7)(C)(v).

In its cut-to-length plate determinations, the Commission adopted the discussion of negligibility contained in § IV(A) of the Commission's views on hot-rolled steel. *See Final Determination* at 219 referring to the Commission's views at 28–32. The Commission's negligibility dis-

[18] In 1992, the unit value for South African plate imports was $331, whereas the unit value for the domestic product was $401. *See Staff Report* at I–134, table 93; *Staff Report,* Appendix C at C–3, table C–1.

cussion set forth the statutory standard, addressed relevant legislative history, and discussed economic factors the Commission considered determinative of negligibility. *Id.* at 28–32.

Respondents in the underlying proceeding, Stalexport, Rautaruukki and Metalexportimport contend that Polish, Finnish and Romanian plate qualified for the negligible imports exception to mandatory cumulation.[19] *Moving Brief on Behalf of Plaintiffs, Stalexport and Huta Czestochowa ("Stalexport's Brief")* at 18; *Brief in Support of Rule 56.2 Motion of Plaintiff Rautaruukki Oy for Judgment on Agency Record ("Rautaruukki's Brief")* at 8–9; *Memorandum in Support of the Motion of Metalexportimport S.A. for Judgment on the Agency Record ("Metalexportimport's Brief")* at 2–3.

Defendant-intervenors, U.S. Steel Group et. al., submit that in *Certain Circular, Welded, Non-Alloy Steel Pipes and Tubes From Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela,* USITC Pub. No. 2454 at 20–24, Inv. No. 701–TA–311 (Nov. 1991) (preliminary determ.) (market share of Venezuelan standard pipe ranged from 0.4% to 0.9%) and in *Coated Groundwood Paper From Austria, Belgium, Finland, France, Germany, Italy, the Netherlands, Sweden, and the United Kingdom,* USITC Pub. No. 2359 at 25, Inv. No. 731–TA–486 through 494 (Feb. 1991) (preliminary determ.), the Commission declined to apply the negligible imports exception even though the respective market share of imports was substantially less than 1%.[20] *Brief in Opposition to Plaintiffs' Motion for Judgment on the Agency Record ("U.S. Steel Group et al.'s Brief")* at 12–13.

POLAND

Respondent Stalexport takes issue with the Commission's determination concerning Poland on several grounds. First, Stalexport maintains that Commissioner Watson's affirmative vote is inconsistent with his individual finding that the domestic plate market is not statutorily price sensitive.[21] *Stalexport's Brief* at 20–21.

Stalexport also argues that Polish plate imports could not have affected domestic prices as they constituted a very small share of domestic plate consumption, were declining in volume and value, and their dollar value was insignificant. *Id.* at 3, 19. Stalexport insists that Poland's small share of the domestic market puts it squarely within the holding of *Torrington Co. v. United States,* 16 CIT 220, 790 F. Supp. 1161 (1992), *aff'd without op.,* 991 F.2d 809 (Fed. Cir. 1993), which recognized that the legislative history of the negligible imports exception guides the Commission to "interpret the negligible import exception 'in a manner

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[19] The Commissioners were evenly divided regarding application of the negligibility exception to Polish and Romanian plate imports. *See Final Determination* at 277, 330, 335 (Commissioners Newquist, Brunsdale and Crawford voting in the negative). Pursuant to 19 U.S.C. § 1677(11) (1988), if the vote is evenly divided, the determination is deemed to be in the affirmative.

[20] In *Coated Groundwood Paper,* USITC Pub. No. 2359 at 33–35, the Commission applied the negligible exception to Austrian imports emphasizing that they were isolated and sporadic.

[21] The domestic market is "price sensitive" by reason of the nature of a particular product if "a small quantity" of imports of that product results in "price suppression or depression." *See* 19 U.S.C. § 1677(7)(C)(v)(III) (1988).

that makes sense given the realities of the marketplace.'" *See Torrington Co.*, 16 CIT at 228, 790 F. Supp. at 1171 (quoting H.R. Rep. No. 40, 100th Cong., 1st Sess., pt. 1, at 131 (1987). *Stalexport's Brief* at 24–25. Stalexport emphasizes that Poland's plate domestic market share, like that of imports not cumulated in *Torrington*, was under 1%.[22] *Stalexport's Brief* at 25.

Stalexport also objects to Commissioner Nuzum's reliance on Commerce's finding of a 62% antidumping duty margin for Polish plate. According to Stalexport, Commerce adopted the wrong methodology to determine Poland's foreign market value, treating it as a nonmarket economy pursuant to 19 U.S.C. § 1677b(c) (1988) although it found that Poland was a market economy country during the POI. *Stalexport's Brief* at 22–23. Stalexport argues that Commerce's dumping duty calculation was flawed because it was not based on a market economy country analysis and, therefore, Commissioner Nuzum's reliance on that dumping margin was improper. *Id.* at 23.

Finally, Stalexport argues that its plate imports could not have had a discernible adverse impact on the domestic plate industry as the imports were isolated and sporadic. In support, Stalexport argues the complexities of Polish imports. It refers to difficulties associated with multi-party sales negotiations, the inconvenience of conforming production to U.S. requirements, transportation problems, delivery time lags of 4–6 months after contracting, quality problems, and prepayment requirements which tie up an importer's working capital. *Id.* at 6–12. Stalexport also contends that plate sales to U.S. purchasers are handicapped by Poland's ability to supply plate only in limited dimensions. *Id.* at 7–8.

U.S. Steel Group *et al.* assert that the dimensions in which Polish plate is generally imported are quite common. *U.S. Steel Group et al.'s Brief* at 32 n.81.

The Court finds that the Commission reasonably exercised its discretion in declining to exclude Polish plate imports from cumulation on the basis that competing Polish imports were not negligible and had an adverse impact on the domestic industry.

The Commission's decision relied on various factors. Specifically, Polish imports increased from 25,546 tons in 1990 to 38,357 tons, and then decreased to 24,605 tons valued at $7 million in 1992. *Staff Report* at I–133, table 93. Poland's share of apparent domestic consumption for the POI increased from 0.5% in 1990 to 0.8% in 1991 before returning to 0.5% in 1992. *Id.* at I–142, table 101. With regard to the statutory factor of "isolated and sporadic," Polish plate sales were made in three of the four regions of the United States in 25 to 36 months and through six importers. *Final Determination* at 232. In addition, Polish commercial grade plate was present simultaneously in the market with similar domestic and imported products 1 and 4 in the Commission's pricing

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[22] The percentages of import share of apparent domestic consumption of the 12 countries found to be negligible in *Torrington* ranged from .2% to .8%. *Torrington Co.*, 16 CIT at 228, 790 F. Supp. at 1171.

series. None of the Polish plate imports were in any alleged niche categories. *Id.* The Commission also took into consideration the statutory factor of price sensitivity[23]. *See id.*

Further, Stalexport's objection with respect to an alleged inconsistency in Commissioner Watson's findings is without merit. Commissioner Watson's participation in the majority's cumulation decision was subject to his separate findings that the plate market is not price sensitive. Therefore, the Court finds no divergence between Commissioner Watson's separate views on this matter and the opinion in which he jo..ied where the majority found the domestic market to be price sensitive. In addition, Commissioner Crawford's economic analysis of price sensitivity has been found acceptable by this court. *See United States Steel Group v. United States,* 18 CIT ____, ____, Slip Opinion 94–201 at 56 (December 30, 1994). As Commissioner Crawford's price sensitivity analysis and her application of economic theory are a viable approach, Commissioner Watson's concurrence in her findings is similarly upheld. Moreover, the Court observes that, Commissioner Watson's concurrence that the domestic market is not statutorily price sensitive does not preclude a finding that Polish plate imports had adverse price effects. Therefore, no remand is required on this basis.

Significantly, in recognition of the fact that the amount of foreign competition which domestic industries may be able to withstand will vary depending on their history of exposure to unfair import competition, the cumulation statute does not provide a specific numerical standard against which to measure negligibility. 19 U.S.C. § 1677(7)(C)(v); *see* H.R. Rep. No. 40, 100th Cong., 1st Sess., pt. 1, at 131 (1987). *See also Torrington Co.,* 16 CIT at 229, 790 F. Supp. at 1171. Therefore, there is no numerical bright line for determining whether imports are negligible. Congress intended that the Commission apply the negligible imports exception narrowly and only in circumstances where it is clear that imports from a particular investigated source are so small and so isolated that they could not possibly be impacting injuriously on the relevant U.S. industry. The Commission is to apply this exception with "particular care in situations involving fungible products, where a small quantity of low-priced imports can have a very real effect on the domestic market." H.R. Rep. No. 40 at 130–31. In addition, the House and Conference Reports stress that the negligibility exception is to be used sparingly and that it is not to be used to subvert the purpose and general application of the mandatory cumulation requirement. *See id.* at 131;

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[23] Only Commissioners Newquist and Nuzum found the domestic plate market to be price sensitive. *Final Determination* at 238 n.250. Commissioner Rohr found a high degree of price sensitivity for plate relative to the other products in these investigations. *Id.* (Additional and Dissenting Views of Commissioner Rohr) at 255. Commissioner Crawford found, and Commissioner Watson concurred, that while the cut-to-length plate market was not price sensitive as defined in the statute, it was more sensitive to price than the hot-rolled, cold-rolled, and corrosion-resistant steel markets. *Id.* at 225 n.112; 238 n.250; 342 (Additional and Dissenting Views of Commissioner Crawford). Commissioner Brunsdale observed that, the domestic plate market was not so price sensitive that small amounts of imports such as those the majority found to be negligible, and those of Poland and Romania which she, individually, found to be negligible, could result in price suppression or depression. (*See* Additional and Dissenting Views of Commissioner Brunsdale at 314, 317).

H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 621 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1654.

Stalexport's objection to Commissioner Nuzum's consideration of Poland's dumping margin is also not compelling. Although Commerce revoked Poland's nonmarket economy status retroactively to January 1, 1992, that decision was made on June 21, 1993. This was relatively late in the process as Commerce's POI covered January 1 through June 30, 1992. Further, Commerce conveyed its intent to conduct a changed circumstance review for Poland. *See Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Poland,* 58 Fed. Reg. at 37,205 (1993). At oral argument, counsel for the ITC advised the Court that a Commerce changed circumstance review was terminated because the Polish producers proved uncooperative. Confidential Tr. of Oral Argument at 49 (Oct. 19, 1994). In fact, Commerce stated:

> On August 13, 1993, we initiated a changed circumstances review (58 FR 44166, August 19, 1993) to provide Huta Czestochowa (Czestochowa), the sole respondent, the opportunity to have a new duty deposit rate calculated using a market economy analysis of sales made during the same period examined in the investigation (January 1 through June 30, 1992). Czestochowa did not respond to the Department's questionnaire despite numerous extensions of time granted by the Department. Moreover, on November 30, 1993, Czestochowa requested termination of this review. Therefore, we have decided to terminate this review.

Notice of Termination of Changed Circumstances Review: Certain Cut-to-Length Carbon Steel Plate From Poland, 58 Fed. Reg. 65,964 (1993). Therefore, the assigned rate of 61.98% remained effective. The Court observes that Commerce possesses exclusive responsibility for LTFV determinations. *See Algoma Steel Corp. v. United States,* 12 CIT 518, 688 F. Supp. 639 (1988), *aff'd,* 865 F.2d 240 (Fed. Cir.), *cert. denied,* 492 U.S. 919 (1989). Dumping margins which may result from Commerce findings may be relied upon by Commissioners unless the margin determinations are judicially found unsound. Stalexport has not shown that the court has rejected the dumping margin at issue.

Moreover, in addition to considering Poland's final antidumping duty margin, Commissioner Nuzum clearly assessed various factors in reaching her conclusion regarding Polish plate imports. *Final Determination* (Additional and Dissenting Views of Commissioner Nuzum) at 371. Commissioner Nuzum noted in her cumulation discussion that, in 1992, Polish plate imports were valued at $7 million and their market penetration was 0.5% of U.S. consumption. Polish plate entered the U.S. in twenty-five out of thirty-six months, through six importers in 1992, and were distributed in three of the four regions. Further, Commissioner Nuzum considered that in twenty-one price comparisons, there were seven instances of underselling and there were three confirmed instances of lost sales or lost revenues. She noted as well that the unit value of Polish plate decreased over the period and remained below the

average unit value of total subject imports. Commissioner Nuzum concluded that, based on the significant presence of Polish plate and their significant degree of competition with domestic and other imported products, Polish plate imports were not negligible. *Id.* Therefore, Stalexport does not succeed on this point.

Finally, Stalexport does not persuade the Court that difficulties related to Polish imports render them harmless. Regardless of any delivery delays, because of Poland's prepayment policy, the domestic industry is injured as soon as domestic plate purchasers negotiate contracts with Polish steel mills. In addition, fast delivery was not one of the most critical concerns for domestic plate purchasers. Domestic purchasers also did not convey dissatisfaction with the quality of Polish plate. *Staff Report* at I–157, I–163.

In sum, the Commission's decision to cumulate plate imports from Poland was supported by substantial evidence and was in accordance with law.

FINLAND

In its final determination, the Commission found that Finnish imports were not negligible and warranted cumulation.

Rautaruukki contends that Finnish plate imports should not have been cumulated as they were *de minimis*. *Brief in Support of Rule 56.2 Motion of Plaintiff Rautaruukki Oy for Judgment on Agency Record ("Rautaruukki's Brief")* at 8. Specifically, Rautaruukki argues that only 186,000 tons of Finnish plate entered the domestic market during the POI as compared to the 15 million tons of domestic purchases of plate overall. Rautaruukki also argues that the *de minimis* volume and share of apparent domestic consumption of Finnish plate imports declined yearly during the POI. *Rautaruukki's Brief* at 9–11.

Rautaruukki maintains that the ITC has previously recognized that countries exporting a quantity of an investigated product that accounts for less than 1% of domestic consumption should qualify for the negligible imports exception. *Id.* at 10. Rautaruukki alleges that, in the instant case, the Commission has applied the negligible imports exception in an overly restrictive manner. Respondent urges the Court to instruct the Commission to apply the negligibility exception when a country's imports are *de minimis*, instead of requiring that they be "extremely" *de minimis*. *Id.*

The Commission argues that, in terms of volume, Finland was the sixth largest exporter of plate to the U.S. during the POI and Finnish plate held a larger share of the domestic market than that of seven other countries shipping plate to the United States. *ITC's Brief* at 58.

The Court finds that the Commission properly cumulated Finnish plate imports for the purpose of determining material injury. The court recognized in *U. S. Steel Group v. United States*, 18 CIT ____, ____, 873 F. Supp. 673, 692–93 (1994), *appeal docketed*, No. 95–1245 (Fed. Cir. Mar. 22, 1995), that *Torrington Co.*, 16 CIT at 229, 790 F. Supp. at 1171. held that the absolute volume of imports does not have independent signifi-

cance for negligibility purposes. The negligibility exception's legislative history confirms this position. *See, supra,* at 32–33. Therefore, the Court declines Rautaruukki's invitation to instruct the Commission to relax its application of the negligible imports exception.

Finnish plate's market share of apparent domestic consumption decreased from 1.5% in 1990 to 1.2% in 1991, and ultimately to 0.9% in 1992. *Staff Report* at I–142, table 101. The volume of Finnish plate imports similarly declined. *Id.* at I–133, table 93. While declining trends are important, in accordance with 19 U.S.C. § 1677(7)(C)(v), the Commission assessed several factors in reaching its decision. Finnish plate imports were not insubstantial; they totaled 83,287 tons in 1990, 55,648 tons in 1991, and 46,975 tons in 1992. *Id.* In addition, Finnish plate sales were not isolated or sporadic as they were sold through twelve importers during thirty-four of the thirty-six POI months in three out of four of the U.S. regions evaluated. *Final Determination* at 225. Furthermore, the majority of Finnish imports were commercial grade plate, Finland sold all four commercial grade products in the Commission pricing series, and the domestic industry produced all of the Finnish niche products. *Id.* at 225. Therefore, Finnish plate was substitutable with domestic plate. With respect to price effects, Finnish plate imports undersold the domestic plate product with margins ranging from 1.1% to 33.0%. *Staff Report* at I–172–75, tables 110–13. One purchaser found Finish plate superior to domestic plate and two found it comparable. *Id.* at I–163, table 109. Finally, the Commission considered the statutory factor of price sensitivity in its assessment. *Final Determination* at 226. This record evidence properly precluded application of the negligibility exception to Finnish plate.

Therefore, the Commission's decision that Finnish plate imports were not negligible and had a discernible adverse impact on the domestic plate market is supported by substantial evidence and is in accordance with law. Accordingly, the Court sustains the Commission's decision to cumulate plate imports from Finland which had been found to satisfy the competition requirement.

ROMANIA

Respondent Metalexportimport advances several arguments in opposition to the Commission's cumulation of Romanian plate imports. First, Metalexportimport argues that its 0.4% market share in 1992 was well within the range of imports considered negligible in the companion investigations involving hot-rolled steel, cold-rolled steel and corrosion-resistant steel. *Memorandum in Support of the Motion of Metalexportimport S.A. for Judgment on the Agency Record ("Metalexportimport's Brief")* at 6.

Metalexportimport asserts that the Commission's findings with respect to other products and countries in the companion investigations is probative of what is reasonable in assessing whether Romanian imports were negligible. Metalexportimport argues that the Commission's finding with respect to Romania is inconsistent with its findings

regarding other products in these investigations which were found to be negligible. *Reply Memorandum in Support of the Motion of Metalexportimport S.A. for Judgment on the Agency Record* at 7. For example, Metalexportimport contends that the Commission found that corrosion-resistant products from Mexico were negligible although their market share was 0.9% and their value was $108 million in 1992. *Metalexportimport's Brief* at 6.

Metalexportimport also maintains that Romanian plate imports were more isolated and sporadic than the imports of numerous products from other countries which the Commission found to be negligible in these investigations. *Id.* at 6–7, 10. Metalexportimport contends that, in deference to these facts, the Commission's finding regarding Romanian imports was based solely on evidence of underselling in a price sensitive market. *Id.* at 7.

Metalexportimport also argues that evidence of underselling by Romanian imports was attributable to differences in price due to the inferior quality of Romanian plate. *Id.* at 13, 16. Further, Metalexportimport maintains that cold-rolled steel imports from Italy and Spain and plate from Italy and France consistently undersold domestic plate, but were found to be negligible. *Id.* at 7. Metalexportimport contends, therefore, that the issue of price sensitivity must have been central to the Commission's finding. *Id.*

Metalexportimport further argues that Commissioner Watson's determination was flawed because of an alleged inconsistency in his findings. Essentially, Metalexportimport questions how Commissioner Watson could find that Romanian plate imports were not negligible and had a discernible adverse impact on the domestic market based on the domestic market's price sensitivity—when he concurred with Commissioner Crawford that the domestic market was not price sensitive. *Id.* at 4–8.

Lastly, Metalexportimport argues that, at best, Romanian plate was only marginally substitutable with domestic products and was not more substitutable than other products found to be negligible in the companion investigations. *Id.* at 12–13.

In assessing the effects of various subsidized or dumped foreign products, divergent determinations on negligibility may result although there may be factual similarities regarding dissimilar industries.

In these investigations, the Commission found a single like product consisting of cut-to-length steel plate. *Final Determination* at 213–16. Metalexportimport has not contested the finding that cut-to-length steel plate is a separate like product. The Commission also found that there is one domestic industry consisting of all domestic producers of cut-to-length carbon steel plate. *See Id.* at 216. The Commission is required to assess the effects of subsidized or dumped imports in relation to the United States production of the like product within that industry. 19 U.S.C. § 1677(4)(D). Hence, the Commission assesses foreign subsidized or dumped products on their own merit, on a case by

case basis. H.R. Rep. No. 317, 96th Cong., 1st Sess. 46 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474. Therefore, although the Commission's findings with respect to hot-rolled, cold-rolled, and corrosion-resistant steel may have some probative value, they do not dictate similar conclusions with respect to cut-to-length steel plate. *See, e.g., Citrosuco Paulista, S.A. v. United States,* 12 CIT 1196, 1209, 704 F. Supp. 1075, 1087–88 (1988); *Alberta Pork Producers' Mktg. Bd. v. United States,* 11 CIT 563, 587, 669 F. Supp. 445, 464 (1987). *See also Maine Potato Council v. United States,* 9 CIT 293, 300 n.7, 613 F. Supp. 1237, 1244 n.7 (1985). Hence, the Court is not swayed by Metalexportimport's arguments which compare and contrast the finding on Romania with the Commission's findings concerning other products from other countries. Also, it is noteworthy that, in absolute terms and as a percentage of apparent consumption, French and Korean plate imports were consistently smaller than those of Romania. *Staff Report* at I–133, table 93; I–142, table 101.

In addition, the negligibility exception requires that the Commission evaluate various relevant economic factors specific to the foreign imports. *See* 19 U.S.C. § 1677(7)(C)(v). No single factor is determinative of negligibility. Particular numerical levels, for example, are not dispositive. *See* H.R. Rep. No. 40 at 131. In this regard, Metalexportimport's contention that the Commission relied solely on evidence of underselling and that price sensitivity was pivotal to the Commission's decision is incorrect. It is clear that the Commission took various factors into consideration. Record evidence demonstrated that Romania's share of apparent domestic consumption during the POI increased from 0.6% in 1990 to 0.8% in 1991 and then declined to 0.4% in 1992. *Staff Report* at I–142, table 101. In terms of absolute volume, Romanian plate imports increased from 31,650 tons in 1990 to 36,428 tons in 1991, before decreasing to 18,078 tons valued at under $7 million in 1992. *Id.* at I–133, table 93. Monthly import data indicated that Romanian plate sales were not isolated and sporadic but were made during thirty-two months of the thirty-six months of the POI, through at least two importers in 1992, in two of the U.S. regions evaluated. *Final Determination* at 232. Romanian and domestic plate were both sold in commercial grade products one and four in the Commission's pricing series. *Id.* In addition, in all cases but one, Romanian plate undersold domestic plate by margins ranging from 1.9% to 47.5%. *Staff Report* at I–172–75, tables 110–13. The Commission also considered that one purchaser deemed Romanian plate inferior to domestic plate because of its shape and lamination, and that Romania's 5–6 month lead time between order and delivery was the longest of any of the countries investigated. *Final Determination* at 232–33. Finally, in reaching its decision, the Commission also considered the statutory factor of price sensitivity. *See id.* at 233. Therefore, Metalexportimport is unpersuasive on this point.

Further, Metalexportimport's contention that underselling was related to the inferior quality of its plate overlooks the fact that the Com-

mission found that Romania sold commercial grade products into the U.S. market that directly competed with similar domestic products. *Id.* at 232. In addition, the average unit values for Romanian plate fell close to the unit values for Mexican, Canadian and Korean plate. Therefore, the quality of Romanian plate is at least of a level which can demand a price similar to that of plate from other countries which purchasers did not consider to be of secondary quality. *Compare Staff Report* at I–134, table 93 and I–163, table 109.

Lastly, Metalexportimport's arguments concerning Commissioner Watson's individual findings on price sensitivity are unavailing for the reasons discussed, *supra,* at 31–32. In addition, Romania exerted discernible price and volume effects constituting adverse impact on the domestic industry and the substitutability of Romanian imports with domestic plate made the domestic industry vulnerable to such effects. *Cf. R-M Indus., Inc. v. United States,* 18 CIT ____, ____, 848 F. Supp. 204, 211 (1994).

Therefore, the Court affirms the Commission's decision to cumulate plate imports from Romania in its material injury analysis.

France and Korea

The Commission found that plate imports from France, Korea and Italy were eligible for exclusion from mandatory cumulation under the statute's negligible imports exception and, individually, were not causing material injury to the domestic plate industry. *Final Determination* at 227, 230.[24]

Raising several complaints, petitioners assert that the negligible imports exception is not applicable to France and Korea. First, faulting the Commission for allegedly relying almost exclusively on volume and market share, petitioners argue that the plain language of the negligible imports exception requires that imports be *both* negligible and have no discernible adverse impact on the domestic industry. *Memorandum in Support of Plaintiffs' Motion for Judgment on the Agency Record ("Petitioners' Brief")* at 9–17. Petitioners argue that the volume of French and Korean plate imports was not negligible and, irrespective of their small U.S. market share, had an adverse impact on the domestic industry. *Petitioners' Brief* at 2, 11. Relying on legislative history, petitioners construe the exception as applying only where it is clear that there is no possibility of *any* injurious impact. *Id.* at 12–16.

Petitioners also maintain that Commissioners Newquist, Nuzum and Rohr disregarded their individual findings of price sensitivity and Commissioners Watson's, Crawford's and Brunsdale's findings of limited price sensitivity improperly depart, without explanation, from the Commission's early to mid-1980's findings that the plate market is price sensitive. *Id.* at 16–21 (referring to the rule that "an agency must either conform itself to its prior decisions or explain the reasons for its depar-

[24] The Commissioners made their negative material injury determination for Korea by a 6–0 vote and for France by a 5–1 vote, with Commissioner Nuzum voting in the affirmative. The Italy negative determination is not at issue in this appeal.

ture" from *Citrosuco Paulista, S.A.*, 12 CIT at 1209, 704 F. Supp. at 1088).

In addition, petitioners contend that the record lacks evidence of discernible adverse impact because the domestic industry's lost sales and lost revenue allegations did not receive full and adequate consideration. Specifically, petitioners argue that the Staff Report[25] upon which the Commission relied was unamended and under-reported confirmed allegations for France and Korea. *Petitioners' Brief* at 22. Petitioners claim that superseding customer letters confirmed [ ] lost revenue allegations regarding Korea and [ ] lost revenue allegations concerning France. *Id.* at 22–28. Petitioners also contend that the Commission's staff improperly rejected allegations which, although incomplete, adequately conveyed injury. *Id.* at 28–32. With respect to allegations containing complete information, petitioners claim that the Commission's staff only investigated [ ] out of [ ] France-related lost sales or lost revenue allegations and [ ] out of [ ] Korea-related lost sales or lost revenue allegations. *Id.* at 32–33. Petitioners rely on *USX Corp. v. United States*, 11 CIT 82, 87, 655 F. Supp. 487, 492 (1987), in support of a remand for failure to properly investigate allegations. *Petitioners' Brief* at 35–36.

Regarding France, petitioners also contend that the Commission's finding of attenuated competition was incorrect and erroneously led to a finding of no discernible adverse impact. Petitioners maintain that the Commission's finding is contradicted by evidence showing that (1) French plate was present in all four U.S. geographic regions and was sold during all thirty-six months of the POI; (2) four domestic purchasers reported that French plate was comparable to domestic plate; and (3) a full [ ]% of the Commission's pricing comparisons by tonnage showed that French plate undersold domestic plate. *Id.* 38–40.

With respect to Korea, petitioners also argue that the Commission improperly relied on evidence of predominant overselling as only [ ]%, or [ ] tons, of all Korean plate imports were investigated. *Id.* at 40.

Lastly, petitioners argue that the Commission should have cumulated French and German plate imports because of the cross-ownership and marketing ties between French plate manufacturer Usinor Sacilor ("Usinor") and related German plate producer AG der Dillinger Huttenwerke ("Dillinger"). According to petitioners, Usinor and Dillinger have the capacity and the incentive to reallocate export shipments from Germany to France in order to avoid the 49.9% combined dumping and countervailing duties which apply to German plate imports. In support, petitioners argue that: (1) Usinor owns 70% of Dillinger's parent, German holding company Dillinger Hyutte Saarstahl AG, which has a 95.22% interest in Dillinger; (2) Usinor markets plate through GTS, its wholly-owned French subsidiary; GTS and Dillinger participate, as members of Usinor's "Flat Products Division," in a common marketing

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[25] The Commission's determination noted one lost sale due to Korean plate imports. *See Final Determination* at 230, citing to *Staff Report* at I–180, table 117.

strategy for plate, devised by Usinor; (3) Usinor and Dillinger use the same U.S. importer and selling agent to market their plate products; (4) Dillinger owns a 100% stock interest in a Florida pipe producer to which Dillinger and Usinor export; and (5) France and German plate imports serve the same niche markets. *Id.* at 41–48.

Petitioners incorrectly contend that any evidence of adverse impact makes imports ineligible for the negligible imports exception. Such a strict interpretation of the negligibility exception would render it meaningless and would unfairly include imports in an affirmative injury finding by virtue of consolidation with the substantial imports of other plate producing countries.

The court has stated that the "determination of no adverse impact is a multi-faceted one, and the court will not construct a *per se* rule." *Kern-Liebers USA, Inc. v. United States,* 19 CIT ____, ____, Slip Op. 95–9 at 19 (Jan. 27, 1995) (quoting *U.S. Steel Group,* 18 CIT at ____, 873 F. Supp. at 692, *appeal docketed,* No. 95–1257 (Fed. Cir. Mar. 27, 1995). Rather, in assessing whether imports are negligible and have no discernible adverse impact, the statute requires the Commission to weigh a number of factors, in addition to volume and market share, including trends in imports such as price declines, evidence of underselling, substitutability, the price sensitivity of the domestic market, and whether imports are isolated and sporadic. 19 U.S.C. § 1677(7)(C)(v).

The Commission's France and Korea determinations clearly did not rely almost exclusively on import volume[26] and market share while, otherwise, largely ignoring the factor of discernible adverse impact. Although the volume and market share of French and Korean imports were important indicators, the record also shows that, during the POI, the domestic industry supplied in excess of 84% of apparent domestic consumption of plate. *See Staff Report* at I–142, table 101. Total imports found to be negligible accounted for only 0.4% of the plate market in 1992, as compared to a 14% share by cumulated imports. *Id.*

France's particular share of apparent domestic consumption increased slightly from 0.2% in 1990, before declining to 0.1% in 1992. *Id.* Absolute volume of French plate imports decreased to 6,652 tons in 1992, a quantity lower than the 1990 level. *Id.* at I–133, table 93. French plate was only moderately substitutable with domestic plate and there was some evidence of overselling,[27] with respect to at least some of the French imports. *Final Determination* at 227. The Commission concluded that evidence of mixed over- and underselling suggested some attenuated competition. *Id.* The mixed pricing evidence suggests that there was less of an adverse impact. However, the Commission placed less emphasis on pricing where volume of imports was very low,[28] as is the case here. *Id.* at 31–32. Therefore, attenuated competition was not a

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[26] In absolute volume, French and Korean plate imports totaled 31,225 and 45,707 tons, respectively, during the POI. *See Staff Report* at I–133, table 93.

[27] Commissioner Rohr did not find the degree of the price differences significant and did not rely on this factor in deciding that French imports were negligible. *Final Determination* at 227 n.134.

[28] Commissioner Nuzum did not join in this statement. *Id.* at 32 n.157.

significant basis for the Commission's France negligibility finding. Further, where there were low volumes, the Commission has generally found imports to be negligible even in a more price sensitive market, and even when there was some evidence of underselling.[29] *Id.*

In addition, the Commission examined the statutory factor of "isolated and sporadic" sales, examining months present, geographic location, and number of importers/consignees handling the imports. *Final Determination* at 227. Although French plate imports were sold in the four regions of the United States during thirty-six months of the POI, *see id.*, imports which are not isolated and sporadic, in appropriate circumstances, may still be negligible. *Torrington Co.*, 16 CIT at 229, 790 F. Supp. at 1171. To conclude otherwise could lead to the absurd result that a regular import flow of a small number of plate products per month would preclude a negligibility finding. *See* H.R. Rep. No. 40 at 131 (cumulation provision not intended to lead to ridiculous results). The determination at issue was reached mindful of legislative history's direction that the negligibility exception "be applied with 'particular care in situations involving fungible products, where a small quantity of low-priced imports can have a very real effect on the market.'" *See Final Determination* at 29 (quoting H.R. Rep. No. 40 at 130; citing H.R. Rep. No. 576, 100th Cong., 2d Sess. 621 (1988)).[30] However, the Commission is guided to assess negligibility in a manner that makes sense in light of the "realities of the marketplace." H.R. Rep. No. 40 at 131.

In addition, the Commissioners' negative findings on price sensitivity were clearly explained.[31] For example, Commissioner Crawford noted that she had evaluated:

> (1) the overall sensitivity of demand to changes in the price of the product (the elasticity of demand), (2) the responsiveness of domestic supply to changes in market price (the elasticity of supply), (3) the availability of nonsubject imports, and (4) the aggregate substitutability of the subject imports for the domestic like product (the elasticity of substitution between subject imports and the domestic like product).

Final Determination (Additional and Dissenting Views of Commissioner Crawford) at 337. Discussing each factor in turn, Commissioner Crawford explained that, while the low elasticity of demand for plate might result in price sensitivity if the subject imports were fungible with the domestic like product and the domestic industry was operating at full capacity, the imports have a low or moderate substitutability with the like product and the domestic industry possesses substantial unused capacity. *Id.* at 337–42. Commissioner Brunsdale also detailed that she had considered the substitutability of imports, the elasticity of demand, the price responsiveness of domestic supply, and underselling. *See Id.*

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[29] Statement not applicable to Commissioner Nuzum. *Id.*

[30] The Commission found that the domestic plate market was price sensitive. *See id.* at 238. *See also supra* at 31 n.23 (Commissioners' individual findings regarding the market's price sensitivity).

[31] *See supra* at 31 n.23 noting Commissioner Watson's concurrence with Commissioner Crawford.

(Additional Views of Commissioner Brunsdale) at 314–15. Therefore, it is apparent to the Court that the Commissioners explained their findings regarding price sensitivity.

Furthermore, a differing finding on price sensitivity from that reached in previous determinations is not a basis for remand. The court has long recognized that "each injury investigation is *sui generis,* involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior injury investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation." *U.S. Steel Group,* 18 CIT at ____, 873 F. Supp. at 695 (quoting *Connecticut Steel Corp. v. United States,* 852 F. Supp. 1061, 1066 (1994) (citation omitted); *Citrosuco Paulista S.A.,* 12 CIT at 1209, 704 F. Supp. at 1087 (quoting *Armstrong Bros. Tool Co. v. United States,* 84 Cust. Ct. 102, 115, C.D. 4848, 489 F. Supp. 269, 279 (1980)). *See also Torrington Co.,* 16 CIT at 226, 790 F. Supp. at 1170. Therefore, the Commission was not bound by its price sensitivity findings in previous steel cases. However, the Commission may not act arbitrarily. *See Kern-Liebers USA, Inc.,* 19 CIT at ____, Slip Op. 95–9 at 25. *See also Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 285–86 (1974) (agency must articulate rational connection between facts found and conclusion reached).

Here, the Commission was presented with a unique set of facts. Although the Court believes that the Commission provided adequate explanation, the Commission is not obliged to explain in any particular manner the change in its views on price sensitivity. *U.S. Steel Group,* 18 CIT at ____, 873 F. Supp. at 695; *see also Allied-Signal Aerospace Co. v. United States,* 28 F.3d 1188, 1191 (Fed. Cir. 1994) (upholding Commerce's selection of "all others" rate under second tier of new best information available methodology without explanation for departure from prior methodology, on basis that methodology was not analogous to regulation having force and effect of law), *cert. denied,* 115 S.Ct. 772 (1995). Therefore, petitioners' argument on this point fails.

In addition, the cross-ownership and marketing ties between French producer Usinor and German producer Dillinger did not compel cumulation of French imports. The Commission concluded that the record lacked evidence supporting petitioners' contention that the multinational operations of Usinor and Dillinger would circumvent the antidumping order on German plate products by diverting shipments to minimize potential duties. *Final Determination* at 227. Petitioners have not pointed to any concrete evidence to support their theory that product shifting had an adverse impact in this case. Therefore, in light of the low volume and market share of French imports, the Commission's decision not to cumulate on this basis was reasonable. The Commission has the discretion to make a reasonable interpretation of the facts, *see National Ass'n of Mirror Mfrs. v. United States,* 12 CIT 771, 778, 696 F. Supp. 642, 647 (1988), and the Court will not decide whether it would have made the same decision on the basis of the evidence. *Matsushita*

Elec. Indus. Co. v. United States, 750 F.2d 927, 936 (Fed. Cir. 1984). Moreover, the court has previously affirmed the Commission's decision not to cumulate based on the conclusion that the affiliated companies' import practices indicated that they did not import principally to benefit from unfair trade practices. *Torrington Co.,* 16 CIT at 230, 790 F. Supp. at 1172.

The Court also observes that petitioners' concerns on this matter relate more to threat of material injury and not to actual adverse impact on the domestic industry. Threat does not require mandatory cumulation. 19 U.S.C. § 1677(7)(F)(iv). *See Asociacion Colombiana de Exportadores de Flores,* 12 CIT at 1174, 704 F. Supp. at 1068. Moreover, the court has held that a finding of threat of material injury and product shifting may not be based on conjecture or speculation. *Alberta Gas Chems. v. United States,* 1 CIT 312, 321–25, 515 F. Supp. 780, 789–91 (1981). Accordingly, the Commission reasonably declined to cumulate French plate imports on the basis of cross-ownership.

Regarding Korea, imports during the POI decreased in volume steadily each year, from 21,361 tons in 1990 to 15,186 tons in 1991, and ultimately to 9,160 tons in 1992. *Staff Report* at I–133, table 93. Korean plate's small share of apparent domestic consumption exhibited a parallel decline to 0.2% in 1992. *Id.* at I–142, table 101. In terms of value, Korean imports amounted to little more than $3 million in a market comprised of $1,952 million in value in 1992. *Id.* at I–39, table 10 and I–133, table 93.

In addition, Korean plate sales were somewhat geographically isolated, concentrated in only two of the four regions of the United States and were made though three importers/consignees in 1992. *Final Determination* at 230. Further, pricing data for Korean plate evidenced a pattern of predominant overselling with margins ranging from 2.9% to 39.4%.[32] *Id.* There were thirteen instances of overselling and three instances of underselling. *Final Determination* (citing *Staff Report* at I–174, table 112 and I–175, table 113). The Commission concluded that evidence of overselling suggested an absence of adverse impact on the domestic industry and somewhat attenuated competition. *Id.* at 230. Most Korean plate imports appeared to be only moderately substitutable with commercial quality domestic plate products. *Id.*

Further, the Court disagrees with petitioners that the Commission's determination is unsupported by substantial evidence because the pricing data utilized in its predominant overselling finding represented an insufficiently low percentage of total Korean plate imports. Petitioners do not allege or point to any evidence showing that the pricing data utilized was inaccurate or unrepresentative of total imports. Moreover, the statute does not require that the Commission assess the price-depressing effects of imports in any particular manner. *Cemex, S.A. v. United States,* 16 CIT 251, 261, 790 F. Supp. 290, 299 (1992), *aff'd without op.,*

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[32] Commissioner Watson also considered high average unit value as supporting overselling data. *Final Determination* at 31 n.154.

989 F.2d 1202 (Fed. Cir. 1993). In its analyses, the Commission has discretion to reasonably interpret evidence and determine the overall significance of any factor. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 88 (1979) ("the significance to be assigned to a particular factor is for the ITC to decide"), *reprinted in* 1979 U.S.C.C.A.N. 381, 474; H.R. Rep. No. 317, 96th Cong., 1st Sess. 46 (1979) (the "significance of the various factors * * * will depend upon the facts of each particular case"); *see also Trent Tube Div., Crucible Materials Corp. v. United States,* 14 CIT 386, 403, 741 F. Supp. 921, 935 (1990), *aff'd,* 975 F.2d 807 (Fed. Cir. 1992). The Court observes that "Congress set no minimum standard by which to measure the thoroughness of a Commission investigation." *Granges Metallverken AB,* 13 CIT at 481, 716 F. Supp. at 25 (Commission's investigation found thorough although pricing data covered only eight out of possible 126 quarters). Therefore, petitioners' argument regarding the Commission's analysis of price data for Korea does not prevail.

Regarding the Commission's handling of lost sales and revenue allegations[33], petitioners' reliance on *USX Corp.,* 11 CIT at 87, 655 F. Supp. at 492, in favor of a remand is misplaced as that case is inapposite. In *USX,* the court directed the Commission to undertake a more thorough investigation because the Commission had failed to investigate four of seven lost sales allegations and all three reported instances of lost revenue, and had relied exclusively on the absence of confirmed allegations to find no significant adverse price effects. *USX Corp.,* 11 CIT at 86, 655 F. Supp. at 491. It was the Commission's sole reliance on the absence of confirmed allegations "[i]n the face of steadily rising import volume and proven margins of underselling" that rendered the Commission's determination unsupported by substantial evidence without further investigation. *Id.* at 86, 655 F. Supp. at 491. In distinct contrast, in the instant case, the Commission's findings regarding France and Korea rested solidly on an assessment of various factors. *See Final Determination* at 226–27, 229–30.

Further, the Staff Report is not devoid of evidence concerning the allegedly unreported allegations. *See Staff Report* at I–180 n.232 (confirmed via form letters: seven allegations concerning 1,175 tons and $98,290 for France; eight allegations concerning 2,020 tons and $187,150 for Korea); *see also Final Determination* (Additional and Dissenting Views of Commissioner Nuzum) at 369–70 (referencing seven instances of France-related lost revenue allegations confirmed by letters solicited by a petitioner and nine confirmed Korea-related lost revenues, including eight confirmed by letters solicited by a petitioner). Therefore, the Court will not infer that the full Commission did not consider all properly confirmed allegations. *See, e.g., Trent Tube Div. Crucible Materials Corp.,* 14 CIT at 395, 741 F. Supp. at 929–30 ("absent a showing to the contrary, the Commission is presumed to have considered all the evidence of record").

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[33] The allegations specific to France and Korea involved only lost revenues. *See Staff Report* at I–180 n.228.

On April 30, 1993, after an initial submittance of a large number of lost sales and revenue allegations, the Commission's staff met with petitioners' counsel and pointed out deficiencies in specific allegations. Petitioners subsequently responded with additional information but were unable to fill in all gaps. AR (Conf.) List 2, Doc. 301H (May 12, 1993 letter from petitioners). Therefore, the Commission's staff endeavored to assist petitioners in creating an adequate record. Further, in challenges to the Commission's investigative thoroughness, remands are appropriate only for failure to seek necessary information. *See Atlantic Sugar Ltd. v. United States,* 744 F.2d 1556, 1561 (Fed. Cir. 1984).

Although evidence of lost sales and revenue may be probative, the lack of such evidence will not vitiate a Commission determination. *Metallverken Nederland B.V.,* 13 CIT at 1025, 728 F. Supp. at 739 (citing to *USX Corp.,* 11 CIT at 82, 655 F. Supp. at 491). *See also Negev Phosphates, Ltd. v. United States,* 12 CIT 1074, 1092, 699 F. Supp. 938, 953 (1988) (holding that the ITC is not required to, but may, incorporate lost sales allegations in analysis of lost sales). While the Commission's approach in the instant case may not have yielded as many confirmed allegations relating to France and Korea as petitioners would like, the court has noted that the ITC is not statutorily required to use a particular methodology to review lost sales (or in this case, lost revenue). *Copperweld Corp. v. United States,* 12 CIT 148, 169–70, 682 F. Supp. 552, 572 (1988); *Maine Potato Council,* 9 CIT at 302, 613 F. Supp. at 1245. The Commission has discretion to pursue investigations in a manner which will yield substantial evidence to support its determinations. *Granges Metallverken AB,* 13 CIT at 481, 716 F. Supp. at 25.

Further, the reasonableness of the Commission's investigations must be judged in light of the short statutory constraints imposed upon the Commission's staff and the problematical nature of obtaining information. *Hannibal Indus., Inc. v. United States,* 13 CIT 202, 208, 710 F. Supp. 332, 337 (1989). Moreover, petitioners' contention that the Commission could have pursued more allegations is irrelevant. The question is not whether the Commission might have obtained additional information, but whether its determinations are supported by substantial evidence and are in accordance with law. *Id.* at 208, 710 F. Supp. at 337 (citing *Atlantic Sugar, Ltd.,* 744 F.2d at 1561). Accordingly, the Court finds that the Commission's handling of lost revenue allegations regarding France and Korea also does not warrant a remand.

Therefore, the Commission's decision to exclude France and Korea from mandatory cumulation was in accordance with law and supported by substantial evidence.

CONCLUSION

The Court finds that, in every case, respondents' and petitioners' challenges are unavailing.

South African plate imports satisfied the statutory requirements for cumulation. As Charleroi raises no arguments particular to Belgium, the Court sustains the Commission's cumulation of Belgian plate

imports in its material injury analysis as supported by substantial evidence and in accordance with law. Likewise, the Court sustains the Commission's inclusion of plate imports from Poland, Finland and Romania and its exclusion of plate from France and Korea in its cumulated present material injury analysis as supported by substantial evidence and in accordance with law.

(Slip Op. 95–97)

ABC INTERNATIONAL TRADERS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–04–00242

[Defendant's motion for summary judgment granted. Action dismissed.]

(Dated May 23, 1995)

Baker & McKenzie (Kevin M. O'Brien and *Teresa A. Gleason)* for plaintiff.
Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Nuriye C. Uygur), David Ross,* Attorney Advisor, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This action is before the court on cross-motions for summary judgment made pursuant to USCIT Rule 56 by defendant United States and plaintiff ABC International Traders, Inc. ("ABC"). ABC, an importer of Japanese televisions, contests the United States Customs Service's ("Customs") assessment of antidumping duties upon ABC's merchandise at manufacturer rates, rather than at the estimated deposit rates assessed at the time of entry of the merchandise. For the reasons that follow, ABC's motion for summary judgment is denied and defendant's is granted.

FACTS

The merchandise at issue, Japanese televisions, are subject to the antidumping duty order in *Television Receiving Sets, Monochrome and Color, from Japan,* 36 Fed. Reg. 4597 (Dep't Treas. 1971) (antidumping duty order). Pursuant to requests by interested parties, the International Trade Administration of the United States Department of Commerce ("Commerce") conducted administrative reviews of Japanese manufacturers Sharp, Toshiba and JVC (Victor). The merchandise was sold by these manufacturers to unrelated resellers. The resellers then sold the merchandise to ABC, which entered the merchandise into the United States between August 1983 and August 1988. Upon entry, Customs suspended liquidation and required a deposit of estimated anti-

dumping duties applicable to the Japanese manufacturers of the merchandise. At the time, the estimated deposit rate applied to ABC's entries was zero percent.

Following subsequent administrative reviews of the antidumping duty order, Commerce determined the dumping margins applicable to the Japanese manufacturers whose products were imported by ABC. *See, e.g., Television Receivers, Monochrome and Color, from Japan,* 55 Fed. Reg. 35,916, 35,921 (Dep't Comm. 1990) (final admin. results for Sharp). In accordance with these final determinations by Commerce, on May 1, 1992, and January 22 and 29, 1993, Customs liquidated ABC's fifty entries at the applicable manufacturer rates. Although ABC has filed protests regarding these entries, to date, Customs has not ruled on the matter. ABC instituted this action on April 29, 1994.

STANDARD OF REVIEW

Summary judgment is appropriately granted where the pleadings and affidavits show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. USCIT Rule 56(d).

DISCUSSION

ABC contests Customs' liquidation of the subject entries at manufacturer rates as contrary to law. ABC asserts that because no administrative review was requested[1] for the resellers of the subject merchandise, liquidation rates should have been the deposit of estimated antidumping duties required at the time of entry pursuant to 19 C.F.R. § 353.22(e)(1) (1992)[2] ("automatic assessment regulation"). As a threshold matter, defendant contends that ABC may not invoke the court's residual jurisdiction under 28 U.S.C. § 1581(i) (1988 & Supp. V 1993).[3] Defendant asserts that the appropriate jurisdictional provision

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[1] Title 19 C.F.R. § 353.22(a) (1992), *inter alia,* provides for requests for administrative reviews:

> (1) Each year during the anniversary month of the publication of an order * * *, an interested party * * * may request in writing that [Commerce] conduct an administrative review of specified individual producers or resellers covered by an order, if the requesting person states why the person desires [Commerce] to review those particular producers or resellers.
>
> (2) During the same month, a producer or reseller covered by an order may request in writing that [Commerce] conduct an administrative review of only that person.
>
> (3) During the same month, an importer of the merchandise may request in writing that [Commerce] conduct an administrative review of only a producer or reseller of the merchandise imported by that importer.

Id.; 19 C.F.R. § 353.22(a) (1993).

[2] Under 19 C.F.R. § 353.22(e)(1),

> if [Commerce] does not receive a timely request [for an administrative review], [Commerce] will instruct the Customs Service to assess antidumping duties on the merchandise * * * at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption.

Id.; 19 C.F.R. § 353.22(e)(1)(1993).

[3] Section 1581(i) provides, in pertinent part, as follows:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States * * * that arises out of any law of the United States providing for—
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> * * * * * * * *
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> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> * * * * * * * *
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i).

is 28 U.S.C. § 1581(c) (1988),[4] whereby ABC could have challenged the final results of the various administrative reviews affecting ABC's entries. ABC responds that jurisdiction is appropriate under 28 U.S.C. § 1581(i) because ABC is challenging Commerce's failure to apply the automatic assessment regulation under 19 C.F.R. § 353.22(e)(1), which applies only when no review is requested.

The merits of this action and the resolution of the jurisdictional issue are not entirely separable. For the most part, resolving the jurisdictional question resolves the merits as well. Pursuant to 28 U.S.C. § 1581(i), the court possesses jurisdiction to decide issues relating to the antidumping duty law, if review is not specifically provided for by other subparagraphs of § 1581. *Industria de Fundicao Tupy v. Brown*, 866 F. Supp. 565, 571 (Ct. Int'l Trade 1994). It is well-settled that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *See, e.g., Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988). ABC asserts that jurisdiction pursuant to 28 U.S.C. § 1581(i) is appropriate because the automatic assessment regulation, on its face, applies when no review of the resellers has been requested. The court disagrees with ABC's reading of the statutes and regulations, and their application to the facts.

ABC relies on *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994), and *Krupp Stahl A.G. v. United States*, 15 CIT 169 (1991), in support of its claim that § 1581(i) jurisdiction exists. Both decisions, however, are distinguishable from the present case. In *Mitsubishi*, the court noted that the trial court possessed jurisdiction under 28 U.S.C. § 1581(i)(2) & (4) because there the automatic assessment regulation pertained to the administration and enforcement of laws providing for duties. 44 F.3d at 977; *see* 28 U.S.C. § 1581(i)(2), (4). Similarly, the court in *Krupp Stahl*, agreeing with the court in *Interredec, Inc. v. United States*, 11 CIT 45, 46 n.1, 652 F. Supp. 1550, 1552 n.1 (1987), found that a challenge to an assessment at the estimated rate and the validity of the automatic assessment regulation invoked jurisdiction under 28 U.S.C. § 1581(i). *Krupp Stahl*, 15 CIT at 171.

In both cases, the party asserting § 1581(i) jurisdiction challenged Commerce's application of the automatic assessment regulation where no administrative review was requested or conducted. *See Mitsubishi*, 44 F.3d at 975; *Krupp Stahl*, 15 CIT at 170. Here, administrative reviews of the Japanese manufacturers of the merchandise imported by ABC were conducted. Further, no reseller or "all other" rate that might have been applicable to ABC's entries of the merchandise existed, for which review might have been sought, or which could have been the basis for

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[4] Section 1581(c) provides that the court "shall have exclusive jurisdiction of any civil action commenced under [19 U.S.C. § 1516a]." 28 U.S.C. § 1581(c). Sections 1516a(a)(2)(A) & (B)(iii) provide that an interested party may contest the final determination resulting from an administrative review under 19 U.S.C. § 1675 (1988) (current version at 19 U.S.C.A. § 1675 (West Supp. 1995)). 19 U.S.C. § 1516a(a)(2)(A), (B)(iii) (1988).

application of the automatic assessment regulation.[5] Thus, unlike in *Mitsubishi* and *Krupp Stahl*, a final administrative determination existed from which ABC could have appealed under 28 U.S.C. § 1581(c), if it had participated in the applicable reviews. *See* 28 U.S.C. § 2631(c) (1988) (providing that only parties to administrative proceedings at issue have standing).

The court disagrees with ABC's contention that ABC was not required to participate in the administrative reviews of the Japanese manufacturers, or to request a review of the resellers, in order to seek application of the automatic assessment regulation now. ABC misinterprets the statutory scheme. Ordinarily, a final determination as to a manufacturer's dumping margin for particular merchandise applies to anyone who imports such merchandise. *See* 19 U.S.C. § 1675(a)(2) ("[Commerce's antidumping duty] determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.") (current version at 19 U.S.C.A. § 1675(a)(2)(C) (West Supp. 1995)). Absent an applicable reseller, or even an "all other" rate, ABC should have known that it would have been assigned the only existing rates, that is, the manufacturers' duty rates determined in the final results of the various administrative reviews. The fact that no review was requested to establish rates for the resellers at issue, or for ABC individually, does not compel Commerce to apply the automatic assessment regulation in this case. In fact, Commerce is compelled to apply the manufacturers' rates as determined on review, because no reseller rates exist.

If ABC was dissatisfied with the rate to be applied to its entries, it could have challenged the manufacturers' dumping margin calculations or requested that Commerce calculate ABC's dumping margins at the reseller price level,[6] rather than on the basis of manufacturer price data. Thus, ABC cannot establish that jurisdiction under 28 U.S.C. § 1581(c) was "manifestly inadequate."

For the very reasons that compel the court to conclude that ABC had an adequate remedy under 28 U.S.C. § 1581(c), if this matter is viewed simply as a 28 U.S.C. § 1581(i) challenge to application of the automatic assessment regulation, ABC would not succeed. ABC received the new rate applicable to the reviewed manufacturers. It did not challenge the application of that rate to its entries. No separate reseller rate existed that might apply to ABC under the automatic assessment regulation.

ABC further asserts that Customs erroneously liquidated certain entries and failed to follow Commerce's liquidation instructions. These

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[5] At oral argument, Commerce indicated that varying new shipper rates were determined for several periods of review. ABC has not alleged, however, that these rates were applicable to its entries. ABC does not appear to have purchased its merchandise from shippers that first entered the market during the review periods.

[6] In that instance, according to Commerce's practice, it must be established that the manufacturer had no knowledge that its sales to the reseller were ultimately destined for the United States. *See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan*, 56 Fed. Reg. 31,754, 31,756 (Dep't Comm. 1991) (final results). The court rejects ABC's attempts here to establish that the Japanese manufacturers at issue had no knowledge of the ultimate destination of their merchandise. As indicated, such arguments may not be made before this court, in the first instance.

claims, however, may be brought before the court under 28 U.S.C. § 1581(a) (1988), after denial of protests by Customs. Assuming, *arguendo*, that the complaint covers these issues, as Customs has not concluded its review of ABC's protests, discussion of these claims now is premature and will not be addressed by the court.

CONCLUSION

ABC misinterprets the statutory scheme, the automatic assessment regulation and their application to the facts of this case. Its remedies lay in a request for establishment of a reseller's rate in the applicable administrative review and, if dissatisfied with the results, in a 28 U.S.C. § 1581(c) challenge in this court. The court grants defendant's motion for summary judgment, and this action is dismissed for lack of jurisdiction and/or failure to state a claim for relief.

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